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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER and AUTRICE COPELAND FREEMAN, *Petitioners,*

v.

STEWART L. UDALL, Secretary of the Interior, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 19, 1965.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Robert V. Ferry, Irving Baker and Autrice Copeland Freeman hereby pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled proceedings on September 9, 1964.[1]

---

[1] In addition to Stewart L. Udall as Secretary of the Interior, the respondents herein include Charles H. Stoddard as Director of the Bureau of Land Management of the Department of the Interior, Fred J. Weiler as Arizona State Director of the Bureau of Land Management of the Department of the Interior, and Roy T. Helmandollar as Manager of the Phoenix Land Office of the Bureau of Land Management of the Department of the Interior.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 336 F. 2d 706 and is reprinted in the appendix hereto, p. 1a, *infra*.

The minute entries of the United States District Court for the District of Arizona are unreported; they are reprinted in the appendix hereto, p. 14a, *infra*.

JURISDICTION

The judgments of the Court of Appeals affirming the summary judgments dismissing petitioners' complaints were entered on September 9, 1964. Timely petitions for rehearing *en banc* were denied on October 21, 1964. On timely application, Mr. Justice Douglas signed an order on January 21, 1965, extending the time for filing this petition to and including March 20, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior, in reliance upon his own regulation (43 CFR 250.5), may in his unreviewable discretion and in the absence of fraud or other irregularity cancel the sale of public land under 43 U.S.C. § 1171 where a qualified bidder therefor has been finally declared to be the purchaser and has paid cash purchase price but where no cash certificate has yet been issued.

2. Whether, under the provisions of 43 U.S.C. § 1171, the declared purchaser of public lands has acquired such an interest and equitable right and title to the

lands so purchased that such interest, right and title can be taken away from him only after administrative notice and hearing and judicial review, particularly where cancellation of the purchase is grounded on an alleged erroneous appraisal so as to constitute a "bad bargain" for the Government.

3. Whether § 10 of the Administrative Procedure Act (5 U.S.C. § 1009) allows judicial review of and relief from the allegedly arbitrary acts of the Secretary of the Interior vacating a sale of public land under the classification and sale provisions of the Taylor Grazing Act (43 U.S.C. §§ 315f, 1171) where the bidder for the land has done all that is required of him under the law and regulations and has been finally declared to be the purchaser of the land.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are § 7 of the Act of June 28, 1934, c. 865, 48 Stat. 1272, and § 14 of the Act of June 28, 1934, c. 865, 48 Stat. 1274, the Act of June 28, 1934, being commonly known as the "Taylor Grazing Act"; § 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243.

Section 7 of the Taylor Grazing Act, as amended by the Act of June 26, 1936, c. 842, Title I, § 2, 49 Stat. 1976, now appears as 43 U.S.C. § 315f and provides in pertinent part:

> **§ 315f. Homestead entry within district or withdrawn lands; classification; preferences.**
>
> The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of Feb-

ruary 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, * * * and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, * * *. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application, of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if opened to entry as herein provided.

Section 14 of the Taylor Grazing Act, as amended by the Act of July 30, 1947, c. 383, 61 Stat. 630 now appears as 43 U.S.C. § 1171 under "Sales of Isolated Tracts" and provides in pertinent part:

§ 1171. Sale of isolated or disconnected tracts.

Notwithstanding the provisions of sections 212, 321, 662, 678 and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty

acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: * * *.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009, provides in pertinent part:

§ 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs

of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

* * * * * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *. In making the foregoing determinations the court shall review the whole record or portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The regulations involved are 43 CFR 101.8 (revised 1954); 43 CFR 221.37 (adopted in Circular 1950, 21

F. R. 1860, March 27, 1956); 43 CFR 250.5 (revised 1954); and 43 CFR 250.12(c) (revised 1954):

43 CFR 101.8 provides:

§ 101.8. *Allowance of applications discretionary with the Secretary of the Interior.* The exchange of privately owned lands under section 8(b) of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g), the ordering of public sales under section 14 of the act (48 Stat. 1274; 43 U.S.C. 1171), and the issuance of leases under section 15 (49 Stat. 1978; 43 U.S.C. 315m), thereof are within the discretionary power of the Secretary of the Interior.

43 CFR 221.37 provides:

§ 221.37. *Finality of decision.* No appeal will lie in the Department from a decision of the Secretary.

43 CFR 250.5 provides:

§ 250.5. *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.

43 CFR 250.12(c) provides:

§ 250.12. *Action after purchaser is declared.*

(c) When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

STATEMENT

Petitioners seek review of the judgments of the Court of Appeals for the Ninth Circuit. The two cases were consolidated in that Court in the respective appeals of the petitioners from two identical judgments entered by the United States District Court for the District of Arizona granting respondents' motions for summary judgment. See appendix hereto, p. 14a, *infra*.

In both cases the petitioners had sought relief involving the administration and sale of public lands under the provisions of § 14 of the Taylor Grazing Act, 43 U. S. C. § 1171, also known as the Isolated Tracts Act, in the District Court under the Administrative Procedure Act, 5 U. S. C., § 1009. The judgments of the Court of Appeals affirmed the judgments of the District Court by holding: (1) that until issuance of cash certificates, as provided for in 43 CFR 250.5, petitioners acquired no interest in the lands sold to them at the respective sales and the Secretary of the Interior was free to cancel, set aside and vacate said sales at any time and for any reason prior to the issuance of cash certificates, and (2) that the power to determine whether or not to sell public lands remained in the discretion of the Secretary at any time up to the issuance of cash certificates and the exercise of such powers of discretion by the Secretary was not subject to judicial review under the Administrative Procedure Act.

In both cases the Secretary of the Interior, long after the respective sales had been held, refused to complete the sales to each petitioner when he determined in an *ex parte* manner that the fair market value of the tracts on the dates they were offered for sale

substantially exceeded the sums bid for these tracts by petitioners, such determination being made without benefit of prior notice or hearing and long after petitioners had paid their monies for the lands and had been declared to be the purchasers thereof.

1. The Ferry-Baker Case

On April 18, 1958, a sale of certain land was held under the provisions of 43 U.S.C. § 1171, at the Phoenix Land Office of the Bureau of Land Management. Petitioners Ferry and Baker were not applicants in the sense that they did not request that the land involved be set aside. Petitioners learned of the sale through a legal notice of sale (Ferry R. 102). The legal notice setting forth the terms of the sale stated that the appraised value of the land was $24,238.55. The announcement further stated the land would be sold to the highest bidder and contained no reference to any right or reservation on the part of the seller to void the sale or to change the appraisal. The notice contained no reference to any reservation except insofar as "contiguous owners" were concerned. No statute or regulation was referred to in the notice except 43 U.S.C. § 1171. No reference to 43 CFR 250.5, upon which the Secretary later relied, appeared in the notice.

The sale was held and petitioner Robert V. Ferry, acting as agent for the petitioner Irving Baker, bid the sum of $32,500 for the said land, which sum was received and accepted by the Manager of the Phoenix Land Office on April 18, 1958 (Ferry R. 79). The Manager declared in writing that

> ". . . the bid of $32,500. is declared to be the high bid and the land will be sold at that price." (Ferry R. 79).

The only qualification concerned preference right claimants.

Thereafter, one Stanley C. Soho appealed the decision of the Manager on the basis that the sale involved fraud and certain immoral and unethical acts. On October 17, 1958, the Bureau of Land Management, by its director, Edward Woozley, affirmed the Manager's decision, rejecting Mr. Soho's allegations of "fraud or collusion" (Ferry R. 19) and finding as a "decisive factor" that petitioners' bid exceeded the appraised value by $8,000.00, and that "It is clear that the Government's interest has not been prejudiced." (Ferry R. 20).

Mr. Soho then attempted an appeal to the Secretary of the Interior. A decision was handed down by the then Assistant Secretary of the Interior, Roger Ernst, on August 19, 1959, A-28135, Stanley C. Soho, Arizona 015912. (Ferry R. 21-26). The Ernst decision reversed and remanded the October 17, 1958, decision of the Director of the Bureau of Land Management on the basis of Soho's charge of attempted collusion. The Ernst decision concluded:

> "The fact that there was competitive bidding and that the United States would *realize a good price for the land* does not justify a disregard of the moral or ethical factors involved." (Ferry R. 26, emphasis supplied).

Petitioner then petitioned for a reconsideration of the Ernst decision and a hearing was granted. On June 17, 1960, Earl J. Thomas, acting director of the Bureau of Land Management, sent out a Notice of Hearing. (Ferry R. 80-83). This notice clearly indi-

cated that the only issue concerned at the hearing would be the

> ". . . evidence relating to the *validity* of a public sale. . . ." (Ferry R. 80, emphasis supplied).

The hearing was held on August 16, 1960. The testimony at the hearing related principally to the charges previously made by Mr. Soho. The record contains a transcript of that portion of the hearing in which some attempt was made to go into the subject of present (two years and four months after sale) land value. (Ferry R. 84-92). The hearing examiner ruled that the evidence of land value was material but that he would entertain a motion to continue the hearing to obtain rebuttal testimony. (Ferry R. 89). Mr. Kratz, attorney for the Department, then decided not to offer the value evidence and withdrew his expert witness. (Ferry R. 89).

No further hearing was ever held in this case and petitioners have at no time been given any opportunity in the administrative proceedings to offer evidence on the subject of land value.

On July 17, 1961, the Department of the Interior issued an order vacating the sale. (Ferry R. 28-31). The order, signed by the Assistant Secretary of the Interior, John A. Carver, Jr., reviewed the testimony of the August 16, 1960, hearing and concluded that, as to attempted collusion,

> ". . . it seems clear that Soho has failed to prove any attempt by Baker to suppress bidding at the sale. . . . To this extent it is necessary to conclude that the primary basis for the Department's decision of August 19, 1959, has been dispelled." (Ferry R. 31).

The order concluded with the following paragraphs:

> "An examination of the record indicates that the fair market value of the offered land may have been higher than the appraised value at the date of appraisal and there is some evidence that the value may have appreciated between the date of appraisal and the date of the sale six months later. Accordingly, the Bureau of Land Management should review the appraisal and determine whether completion of the sale would be in accordance with the land conservation policy announced by the Secretary on February 14, 1961. If not, the vacation of the sale will stand. None of the parties, of course, has acquired any rights in the land since cash certificate has not been issued. 43 CFR 250.5; *Buck Willcoxson*, A-27402, A-27403 (December 17, 1956); *Alexander David Norton*, A-27040 (March 7, 1955).
>
> "Therefore, the case is remanded for further proceedings consistent with this decision." (Ferry R. 31).

Thereupon, petitioners sought from the Department a reconsideration of that portion of the order of July 17, 1961, dealing with the review of the appraisal and ordering the remand. (Ferry 93-101). The Department, to this date, has made no ruling, nor has it, in any way, replied to this motion for reconsideration.

Petitioners and their attorney were given no notice of any action taken on this matter from the time of the petition for reconsideration until the order dated February 1, 1963, and approved by the Secretary of the Interior, Stewart L. Udall, on March 18, 1963, entitled "Vacation of Sale Affirmed." (Ferry R. 36).

The Secretary there vacated the sale stating that upon a review of the

> "... appraisal of the lands in question as directed [we] have determined that it was not an accurate reflection of the market value of the land at the time the sale was held."

It was further found that a completion of the sale held on April 18, 1958, would not be consistent with the land conservation policy announced on February 14, 1961.

The sum of $32,500.00 paid by petitioners, plus an additional $400.00, was retained by the Department up to and past April 3, 1963, at which time the Government tendered a draft for the sum of $32,900.00 to petitioner Ferry. (Ferry R. 114). This draft was first forwarded to Herbert B. Finn, attorney for petitioners Ferry and Baker, on April 24, 1963. (Ferry R. 112).

Petitioners filed action for judicial review in District Court. Motions for summary judgment were made by both parties. The petitioners filed four affidavits (Ferry R. 63-70), all to the effect that affiants were acquainted with the value of the public land involved in this action at the time of the original appraisal in this action was fair on the basis of the terms involved in the sale in question: that the Department's reappraisal was so false and unreasonable when applied to the terms of the subject sale

> "that such an estimate could only have been arrived at in some capricious, unreasonable and arbitrary manner ..." (Ferry R. 64, 66, 68, 70)

The Secretary submitted no controverting affidavits. The Department simply submitted a copy of its original appraisal and the reappraisal. (Ferry R. 115-164). A close examination of these appraisals show that they support rather than controvert the facts stated in the foregoing affidavits. The reappraisal restated the original evidence, merely adding thereto data as to sales later in date, sales on terms rather than cash, sales of properties more favorable located, and sales of smaller parcels of land.

The evidence submitted with both appraisals supports petitioners' affidavits to the effect the original appraisal accurately reflected the market value of the subject land on the basis of the terms of the sale, to wit: cash bulk sale of 692.53 acres on April 18, 1958.

However, the District Court granted respondents' motion for summary judgment and dismissed petitioners' action. An appeal to the Ninth Circuit followed.

2. The Freeman Case

In April of 1958, at the request of Zeta A. Copeland, deceased husband of petitioner Freeman, 1129.04 acres of public lands near Tucson, Pima County, Arizona, were classified by the state office of the Bureau of Land Management in accordance with § 7 of the Taylor Grazing Act as suitable for disposal under the provisions of § 14 of the Taylor Grazing Act and the appraised value thereof was fixed at $35.00 an acre, or $39,516.40 (Freeman R. 93). On July 8, 1958, notice and order for sale were issued pursuant to said classification and appraisal, and such notice was published

in a Tucson newspaper (Freeman R. 58).[2] On August 28, 1958, the sale was held and the land was sold by the Land Manager to petitioner for $39,517.00 (Freeman R. 102).

Petitioner was declared to be the high bidder and she paid the cash purchase price to the Manager, who issued receipt therefor to her. Within the thirty-day statutory period conflicting claims by persons claiming preference rights under the provisions of 43 U.S.C. § 1171 were filed and after prolonged proceedings in the Department of the Interior the Secretary on October 26, 1960, through his Solicitor, declared Freeman to be the purchaser of the land (Freeman R. 96).

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[2] The published notice did not indicate to the public that there was reserved at any time and for any reason up to the time of issuance of cash certificate the right to vacate and set aside the sale as provided in 43 CFR 250.5. The only reference made to the regulations was this phrase: "For reimbursement to owners of authorized improvement on the lands, payment of cost of publication, and other requirements, see 43 CFR, Part 250". (Freeman R. 58). Since these actions were instituted by petitioners the Secretary has seen fit to amend the provisions of 43 CFR 250.5 and spell out the rights of the Government until cash certificate is issued. The text was amended by Circulars 2095 and 2098 published in the Federal Register Docs. 63-925 and 63-1826 January 29, 1963, and February 20, 1963 (now codified as 43 CFR 2243.2 entitled *Effect of application and award of bid*, April 1, 1964, Supplement) and requires that all public notices of sale under the regulations must now state expressly that the Government will reserve the right to reject any and all bids received at any public sale of lands prior to the issuance of final certificate. The Secretary in adopting the amendment stated in the first amendment published in 28 F. R. 826: "The purpose of this amendment is to inform the public that the Government will reserve the right to reject any and all bids received at any public sale of lands prior to the issuance of final certificate" (Exhibits 7 and 8, Freeman R. 74, 75).

No appeal was taken by the conflicting applicants from this final decision to the courts for judicial review and the decision became final under the provisions of 43 CFR 221.37. However, notwithstanding this final decision, no cash certificate was issued as a result thereof.[3]

On April 14, 1961, a joint decision of the Associate Director and Secretary was rendered and, based upon an unpublished new land conservation program policy of Secretary Udall (Freeman R. 69, 91), the sale of August 28, 1958, was vacated on the ground that the then present value of the land exceeded the bid price by ten times (Freeman R. 94, 95). As a result of Freeman's petition for reconsideration of the decision of April 14, 1961, the Assistant Secretary on February 27, 1962, held the new land conservation policy would be construed and applied to mean that the consummation of a public sale should depend upon whether the amount paid or offered by a successful purchaser was equal to or over the fair market value of the land on the date of the sale rather than to penalize the purchaser for appreciation in value of the offered land occurring after the date of sale. The Assistant Secretary concluded by remanding the case back to the Bureau of Land Management to determine whether the Freeman bid reflected the fair market value of the land

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[3] Such certificates—called cash certificates in cash sales and final certificates in other entries such as homestead, etc.—are not documents which create rights. This Court has said they are simply papers to which a claimant is "entitled" when he "acquires a vested interest" in public lands, *The Yosemite Valley Case*, 15 Wall. 77, 87—they furnish "*prima facie* evidence of an equitable claim upon the government for a patent", *Guaranty Savings Bank* v. *Bladow*, 176 U.S. 448, 454.

on the date of sale, and held that if it did the sale would be reinstated and processed further, but that if it did not the vacation of the sale would stand (Freeman R. 66 and 94).

Thereafter a new appraisal was made by the Bureau of Land Management and as a result thereof the Acting Director and Assistant Secretary on June 8, 1962, confirmed the earlier decision of April 14, 1961, vacating the sale on the grounds a new appraisal of the lands as of the date of sale showed the fair market value of the lands exceeded the bid more than six times (Freeman R. 88). Apparently during the period between February 27 and June 8, 1962, a new appraisal as directed by the Secretary's decision of February 27, 1962, was made of the land. This was a *secret appraisal*, a copy thereof never having been furnished petitioner; nor was the appraisal ever furnished the trial court and it therefore is not a part of the record before this Court. Notwithstanding this fact, the joint decision of June 8, 1962, was based on this *secret appraisal.*

From the decision of June 8, 1962, petitioner on December 12, 1962, filed in the United States District Court for the District of Arizona her complaint to have the District Court review under the Administrative Procedure Act, 5 U.S.C. § 1009, adverse decisions of respondents involving the administration and sale of public lands and for a decree declaring the decisions null and void and directing issuance of cash certificate and patent to petitioner Freeman. As in the Ferry-Baker case, summary judgment for the respondents was entered, the action dismissed and an appeal followed.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In affirming the unqualified discretionary power of the Secretary of the Interior to cancel otherwise lawful sales of public land, where the agreed-upon price has been paid, the court below has reached a result in direct conflict with the applicable decisions of this Court.

As long ago as 1845, this Court declared in *Carroll* v. *Sanford,* 3 How. 441, 461, that the United States "has no right to refuse a patent to a *bona fide* purchaser of land offered for sale" absent fraud or mistake. Once the purchase price has been paid, said Mr. Justice McLean for the Court (3 How. at 460-461), "it was no longer the property of the United States, but of the purchaser. . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser . . ."

This rule has been followed in an unbroken line of decisions by this Court during the past century.[4] Referring to the principle as a "general rule of real estate law," the Court has noted (*Benson Mining Co.* v. *Alta Mining Co.,* 145 U.S. 428, 432) that the rule has been

> ". . . repeatedly applied by this Court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that *whenever, in cash sales, the price*

[4] See, e.g., *United States* v. *Hughes,* 11 How. 552, 568; *Witherspoon* v. *Duncan,* 4 Wall. 210, 219; *Atherton* v. *Fowler,* 96 U.S. 513, 518; *Simmons* v. *Wagner,* 101 U.S. 260, 261; *Cornelius* v. *Kessel,* 128 U.S. 456, 460-461; *Benson Mining Co.* v. *Alta Mining Co.,* 145 U.S. 428, 432; *Cameron* v. *United States,* 252 U.S. 450, 460; *Payne* v. *New Mexico,* 255 U.S. 367, 371; *Wyoming* v. *United States,* 255 U.S. 489, 501.

> *has been paid*, or, in other cases, all the conditions of entry performed *the full equitable title has passed,* and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership." [Emphasis added.]

Once the purchase price has been paid, as this Court said in *Simmons* v. *Wagner,* 101 U.S. 260, 261, the right to a patent becomes "vested in a purchaser of public lands," the equivalent, "so far as the government is concerned, to a patent actually issued." The execution and delivery of the patent thereafter "are the mere ministerial acts of the officers charged with that duty." *Ibid.*

Finally, in the 1921 decision in *Wyoming* v. *United States,* 255 U.S. 489, 501, the Court—speaking through Mr. Justice Van Devanter, an acknowledged expert on the administration of the public lands[5]—reiterated that

> ". . . as respects cash entries and entries under the pre-emption, homestead, desert land, and kindred laws, the Land Department always has ruled that if, *when the claimant has done all that he is required to do to entitle him to receive the title,* the land is not known to be mineral, *he acquires a vested right* which no subsequent discovery of mineral will divest or disturb." [Emphasis added.]

And, quoting from *Benson Mining Co., supra,* 431, Mr. Justice Van Devanter repeated that "When the price is paid the right to a patent immediately arises." 255 U.S. at 497.

The determination below that the Secretary of the Interior has unlimited power, prior to the issuance

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[5] Mr. Justice Van Devanter's expertise was acknowledged in *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336-337.

of cash certificates, to vacate a sale of public land to a declared purchaser who has paid the agreed-upon price cannot be squared with the foregoing decisions. And the efforts of the court below to distinguish those cases and their impact upon the circumstances of the instant proceedings serve to augment the importance of the questions presented and the appropriateness of review by this Court.

(a) The Attempted Distinction of the Cases

The court below stated (see p. 6a, *infra*) that the aforementioned decisions of this Court are distinguishable since they involved statutes making it mandatory for the Secretary to transfer the land to those who complied with statutory requirements, his discretion being limited to determining whether such requirements had been met. But the instant situation was different, in the eyes of the court below (p. 6a, *infra*), since under the so-called Isolated Tracts Act, 43 U.S.C. § 1171, Congress "has left entirely to the Secretary's discretion whether to dispose of the land or not"—and disposition is said not to finally occur pursuant to regulation (43 CFR 250.5) until a cash certificate has issued.

Such a distinction would appear ineffectual to avoid the controlling impact of this Court's decisions. No one denies that the Secretary has discretion in deciding whether or not to sell or dispose of public lands.[6] The question, rather, involves the legal consequences

[6] As the court below noted, p. 3a, *infra*, the Secretary has discretionary authority under § 1171 to decide whether "in his judgment, it would be proper to expose for sale" any isolated tract of public land. That discretion was exercised in the instant cases when the Secretary decided to classify the lands in question and to offer them for sale.

of an affirmative determination to sell where a bid from a qualified purchaser has been accepted and cash payment of the purchase price has been made. Time and again this Court has ruled that the purchaser thereby acquires a vested equitable title that cannot be divested. And the cash certificate that eventually issues has been described by this Court as a paper to which the purchaser is "entitled" when he "acquires a vested interest" in public lands. *The Yosemite Valley Case*, 15 Wall. 77, 87. The cash certificate, in short, furnishes "*prima facie* evidence of an equitable claim upon the government for a patent." *Guaranty Savings Bank* v. *Bladow*, 176 U.S. 448, 454.

These established principles appear applicable wherever the cash sale system is employed in the disposal of public lands, whatever differences or variations there may be in other aspects of such disposal.[7] As this Court emphasized in the *Wyoming* case, 255 U.S. at 501, "as respects cash entries and entries under the pre-emption, homestead, desert land and kindred laws . . . when the claimant has done all that he is re-

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[7] For example, in the *Wyoming* case Congress rather than the Secretary of the Interior made the initial discretionary decision to offer lands for sale; and Congress rather than the Secretary offered the land to a qualified applicant. But the legal consequences of cash payment by a qualified purchaser would be the same under either method. As was said by the Court, 255 U.S. at 479:

> "Of course the state's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price."

quired to do to entitle him to receive the title . . . he acquires a vested right which no subsequent discovery of mineral [or presumably a revaluation of the land] will divest or disturb." And since sales under § 1171 are plainly within the cash sale or cash entry system, the principles of the *Wyoming* decision appear applicable. "When the price is paid the right to a patent immediately arises." *Benson Mining Co.* v. *Alta Mining Co., supra,* 431.[8]

Recognition of the vesting of an indefeasible equitable title in petitioners would thus be the inescapable consequence of following this Court's prior decisions. And in the absence of any Congressional language or intent to change that consequence in sales under § 1171, those decisions should be followed. Certainly the distinctions sought to be drawn by the court below merit the full review and consideration of this Court. If so important a change is to be made in the consequence of a cash sale of public land as delineated by this Court in the past, this Court should give the matter its full attention.

(b) The Reliance on the Administrative Regulation

The major effort of the court below to avoid the thrust of this Court's teachings in the *Wyoming* line of cases was concentrated on the interpretation and application of the Secretary's own regulation, 43 CFR

[8] The *Benson* case involved a dispute between applicants for a patent to mineral land and a subsequent locator. Section 2325 of the Revised Statutes provided, with respect to mineral lands, that "it shall be assumed that the applicant is entitled to a patent, upon payment to a proper officer." That statutory provision, which has no counterpart in § 1171, would seem to be a Congressional recognition of the uniform doctrine of this Court, a doctrine applicable even when Congress is silent in a particular instance. Certainly there is no language in § 1171 which purports to void or change that doctrine.

250.5. That regulation provides that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or other bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

Concededly, the Department of the Interior "has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336. But that broad power does not encompass the right to issue regulations which are "inconsistent with law", *United States* v. *Smull*, 236 U.S. 405, 409, or which "enlarge or curtail" statutory rights, *Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 236. Indeed, as was said in *Cornelius* v. *Kessel*, 128 U.S. 456, 461, and repeated in *Ballinger* v. *United States ex rel. Frost*, 216 U.S. 240, 248, the power of the Secretary over public lands "is not an unlimited or an arbitrary power . . . . It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property."

Thus emerge two vital problems with respect to the lower court's reliance on 43 CFR 250.5:

(1) As a matter of interpretation, should not this regulation be read in a manner consistent with this Court's repeated rulings that equitable title does pass to a qualified purchaser who has fully satisfied all requirements and paid cash for the land?

The provision of § 250.5 that "until issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold" should be viewed in conjunction with § 250.12(c), which provides that "When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser." So read, these regulations suggest that the Secretary intended to vacate or void a sale only where there has not been full compliance with the regulations. But where the high bidder has fully complied with all requirements, has been finally declared to be the purchaser, and has paid cash for the land, "the manager will issue a cash certificate" under § 250.12(c). There would then be no occasion—excepting the discovery of fraud or mistake —for the Secretary to vacate the sale under § 250.5.

Such a reading of the regulations would be consistent, moreover, with the Department's own recognition and approval of the doctrines enunciated by this Court in the *Wyoming* line of cases. Thus in *State of Wisconsin et al.*, 65 I.D. 265 (June 17, 1958), the Department discussed the *Wyoming* and other decisions of this Court and concluded (p. 272):[9]

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[9] See also *John W. Stanton*, 50 I.D. 242 (1924), involving a private relief act authorizing the Secretary *in his discretion* to issue a patent to Stanton upon his payment for land at the rate of $1.25 an acre. The Department, in following *Wyoming*, held (p. 244):

> "In this case *the payment of the purchase price* prescribed by Congress *was the final act prescribed by law as necessary to be performed by Stanton;* and, as the report as to the prospective mineral character of the land was not rendered until after such payment had been made and accepted by the local officers, *Stanton acquired equitable title*, and the burden of showing that the lands were known to be mineral in character at the time of payment shifted to the Government." [Emphasis supplied].

> "The cases which have been discussed appear to establish these principles: Where one has done all that is required of him under a particular statute and has earned equitable title to a tract of public land, nonetheless so long as legal title remains in the United States, the Secretary retains jurisdiction to inquire *into the validity* of disposing of the land to that person. The Secretary, however, can vacate the disposal and refuse to issue patent *only for proper grounds existing prior to or up to the time equitable title was earned.* * * *
>
> "In the case where a disposal can validly be set aside, despite the passage of equitable title, due process permits such action to be taken *only after proper notice and hearing.*" [Emphasis supplied]

The Department has seemed to recognize that once equitable title has passed to a qualified purchaser, the retention of legal title in the United States until issuance of the patent gives the Department the right to vacate a sale only if it was void and "for proper grounds existing prior to or up to the time equitable title was earned." Otherwise, equitable title cannot be voided. And it would be fair to read the Secretary's regulations, §§ 250.5 and 250.12(c), consistently with that administrative analysis.

(2) But if § 250.5 cannot be read, as petitioners suggest, in a manner consistent with the *Wyoming* line of cases, then the ultimate question must be reached—does the Secretary have the power to promulgate a regulation which purports to change the legal consequences of a cash entry system under which, as this Court has repeatedly held, a purchaser acquires equitable title on payment of the cash price?

In 1944, when § 250.5 was first promulgated, there can be no question as to the controlling effect of the

principles enunciated by this Court. But does the Secretary have the power to alter those principles and change the legal consequences attendant upon sales under § 1171—a statute on the books since 1846 (Act of Aug. 3, 1846, 9 Stat. 51)?

In the absence of some pertinent legislative amendment of statutes comprising the cash sale system, there would appear to be most serious doubts whether the Secretary can wholly disrupt the meaning and effect given those statutes by the consistent interpretation of this Court. Particularly are these doubts substantial where the rights at stake have been denominated "vested rights" by this Court. And in light of the statement in *Cornelius* v. *Kessel*, 128 U.S. 456, 461, that the Department cannot exercise its power "so as to deprive any person of land lawfully entered and paid for" or so as to deprive the purchaser of his "vested right in the property and a right to a patent therefor," a most significant question is raised as to the validity of § 250.5 of the Department's regulations.

An additional question as to the validity of § 250.5 is raised by virtue of the provision in 43 U.S.C. § 678, which is of general application, that "at every public sale [of public lands], the highest bidder . . . shall be the purchaser." While 43 U.S.C. § 1171, under which the instant lands were sold, authorizes the Secretary to sell lands "notwithstanding the provisions of section 678 . . .," it seems questionable whether this exception to § 678—which requires that public land be sold at no less than $1.25 an acre—was intended to do other than permit the Secretary to sell isolated tracts of land under § 1171 for less than $1.25 an acre, which he often does. There is nothing in § 1171 which is inconsistent with the mandate of § 678 that the

highest bidder "shall be the purchaser." And the effort of the Secretary by regulation to alter that mandate—in the absence of fraud or mistake—would seem impermissible.

(c) The Willcoxson Case

The court below relied heavily, in reaching its result, upon the decision of the Court of Appeals for the District of Columbia in *Willcoxson* v. *United States*, 313 F. 2d 884. This Court denied certiorari in that case, 373 U.S. 932, No. 983, Oct. Term, 1962.

The *Willcoxson* case, however, involved the discovery of minerals in the land subsequent to the cash sale but prior to the issuance of the cash certificate. The land was thus sold under a gross mistake as to its true nature, making the sale void *ab initio*, a factor not present in the instant cases. The Government here did nothing more than reappraise the land as of the time of the sale and decide that it had made a bad judgment in tendering the land for sale on the basis of a specified appraisal.

But apart from this obvious difference in the cases, the *Willcoxson* decision underlines several important considerations:

(1) The problem as to the legal rights of cash purchasers of public lands is of a recurring nature. The *Willcoxson* decision, combined with the decision below, illustrates that this problem is of growing concern in the administration of the public land laws and thus justifies plenary exploration by this Court.

(2) The court in the *Willcoxson* case promulgated an analysis of the problem which was followed by the court below, an analysis which tends to subvert the principles established by this Court.

By providing in § 250.5 that the authorized land officer may decide not to sell at any time prior to issuance of a cash certificate, said the court in *Willcoxson*, 313 F. 2d at 888, the regulation in effect denotes issuance of the certificate as acceptance of the bid proposal; the situation was then likened to an auction without reserve in ordinary contract parlance. The court below adopted a similar analysis. See p. 5a, *infra*.

But in holding that since the Secretary has discretion to sell he can reject a bid and void a sale up to the point of issuing a cash certificate, the lower courts have undermined the basic concept of cash sales of public land as developed by this Court over the past century. If the Secretary has the freedom, by reference to ordinary contract law or otherwise, to change the legal consequences of the cash sale system and to establish the final acceptance of a cash bid at any point in time he sees fit, then the legal certainty that has long accompanied the public land disposal program is at an end. Legal rights which have always been considered vested on the cash payment of the agreed-upon price become subject to the discretionary whim of the Secretary or his subordinate officer.

The result reached below thus merits the invocation of this Court's full review powers. The decision of the court below simply means that the Secretary can, by postponing what he calls final acceptance of a bid, do away entirely with the concept of equitable title acquired on the payment of cash—a concept engrained in the law by this Court. And by the very language of § 250.5, the Secretary has indicated his intent to do away with all "contractual or other rights as against the United States"—including the equitable title claims long recognized by this Court—prior to the issuance of a cash certificate.

The recent amendment to § 250.5, promulgated in 1963 after the institution of the instant court proceedings,[10] makes the Secretary's challenge to established law even bolder by expressly stating that the Department reserves the right to reject all bids received at any public sale of lands prior to the issuance of final certificate. Such a radical departure from the law should be sanctioned, if at all, only after the most careful scrutiny of this tribunal.

II. THE IMPORTANT AND UNSETTLED QUESTION OF FEDERAL STATUTORY LAW.

The court below, as well as the District of Columbia Court of Appeals in the *Willcoxson* case, *supra,* construed the so-called Isolated Tracts Act, 43 U.S.C. § 1171, and the Secretary's regulation, 43 CFR 250.5, in isolation, without regard to their integral relationship to the Taylor Grazing Act. Act of June 28, 1934, 48 Stat. 1274, 43 U.S.C. § 315, et seq. The failure to read the provisions in their broader and proper setting not only has led to an impermissible result as respects the Secretary's discretionary authority but has created an important question of federal statutory law that has not been but should be settled by this Court.

For many years following its initial appearance on the statute books in 1846, 9 Stat. 51, the Isolated Tracts Act was a separate provision. But in 1934, Congress reenacted it as § 14 of the Taylor Grazing Act, a designation which is still in effect. It is in that setting that § 1171 of Title 43, U.S.C., must be viewed.

The Taylor Grazing Act was basically designed to establish grazing districts amid large areas of public land, thereby controlling the use of the land and pro-

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[10] 43 CFR 2243.2; 28 F.R. 826. See footnote 2, p. 15, *supra.*

tecting against waste through overgrazing and other harmful practices. But throughout the legislative debates on the measure fears were expressed as to the extent of the discretionary powers of the Secretary of the Interior over the establishment of grazing districts and over the administration of the public land disposal laws. See 78 Cong. Rec. 3310, 11140-43 (73rd Cong., 2d Sess.); and see dissenting opinion of Circuit Judge Bazelon in *LaRue* v. *Udall*, 324 F. 2d 428 at 435 (App. D.C.). Congress therefore sought to establish the basic guidelines for grazing control and for disposal of isolated tracts rather than to leave such matters to the unfettered discretion of the Secretary.

Section 14 of the Act—containing essentially the same language as now appears as § 1171 of 43 U.S.C.—was added in the Senate on motion of Senator O'Mahoney of Wyoming. The Senator explained, 78 Cong. Rec. 11150-51 (June 12, 1934), that the purpose of this provision was to enable

> "... the Secretary of the Interior to sell certain isolated tracts which are not suitable for inclusion in grazing districts. It appears that the public-land laws now governing the sale of isolated tracts fix the minimum price of $1.25 an acre on some and $2.50 an acre on others. In view of the fact that the amendment changes the whole system by providing for appraisal, it was deemed advisable to do away with that limitation as to price and also with the limitation as to the amount of acreage a single purchaser may acquire."

As finally enacted, the Taylor Grazing Act gave the Secretary only three discretionary powers:

(1) The power in § 7, now found at 43 U.S.C. § 315f, to examine and classify any lands within grazing dis-

tricts more suitable for crop growing than for producing grasses and forage plants and to open such lands to entry, selection and disposal under applicable public-land laws;

(2) The power in § 8, now found at 43 U.S.C. § 315g, to make certain exchanges of lands within grazing districts with States and private interests; and

(3) The power in § 15, now found at 43 U.S.C. § 315m, to lease isolated tracts outside the grazing districts to the owners of contiguous lands.

Shortly after the passage of the Act, the President on November 26, 1934, issued a temporary withdrawal order withdrawing all vacant unreserved and unappropriated public lands of twelve named Western States from settlement, location, sale or entry pending classification—thereby in effect abrogating the provisions of § 14 authorizing such disposal. See 54 I.D. 539. Reacting to the alarm of Western members, Congress thereafter amended the Taylor Act, particularly § 7 thereof, to authorize the Secretary of the Interior in his discretion to examine and classify lands withdrawn by the 1934 Executive Order, as well as by a subsequent Order in 1935, for uses other than grazing both inside and outside the grazing districts. This amendment now appears as 43 U.S.C. § 315f.

It is thus apparent that Congress carefully limited the discretionary powers of the Secretary in the administration of the Taylor Grazing Act. And the language in § 14 of the Act (43 U.S.C. § 1171)—that the Secretary may order sold that isolated land "which, in his judgment, it would be proper to expose for sale"—can only have reference to his discretionary authority under § 7 of the Act to classify certain types of land

and to dispose of such land "under applicable public-land laws." In other words, this language of § 14, which the court below seized upon as proof of the Secretary's broad discretion to alter the legal nature of the cash sales system (see p. 3a, *infra*), is nothing more than a limited cross-reference to the discretionary classification power under § 7.

Accordingly, before the Secretary can offer isolated tracts for sale under § 14, he must first classify the land as suitable for such a sale and order the land sold in accordance with § 7. That classification and order for sale comprise the outer limits of the discretion which Congress gave the Secretary in connection with isolated land sales. And once he classifies the land as suitable for public sale, has it appraised and offers it for sale (particularly after he has declared the high bidder to be the purchaser), his discretionary powers have some to an end—save only as to the discovery of fraud or gross mistake as to the character of the land.[11] Thereupon the rules established by this Court as to the legal consequences of such a cash sale become of controlling effect.

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[11] At the time of the sales here in question, the Secretary by his own regulation recognized the limits of his discretionary powers under the Taylor Grazing Act. This regulation, 43 CFR 101.8 (1954 ed.), provided:

> "*Allowance of applications discretionary with the Secretary of the Interior.* The exchange of privately owned lands under section 8(b) of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g), the ordering of public sales under section 14 of the Act (48 Stat. 1274; 43 U.S.C. 1171), and the issuance of leases under section 15 (49 Stat. 1978; 43 U.S.C. 315m), thereof are within the discretionary power of the Secretary of the Interior."

Thus the problem of statutory construction in this case is of far greater scope than that of interpreting the language of § 14 in isolation, as the court below did. The entire Taylor Grazing Act must be read and construed in relation to the Secretary's discretionary power respecting the sale of isolated tracts, an Act wherein Congress was careful to limit and to spell out precisely the discretion exercisable by the Secretary. So viewing the Act, the conclusion seems inescapable that Congress never intended to give the Secretary discretionary power to repeal the "cash-sale vesting rule" firmly established by this Court.

The statutory problem is of obvious significance in the administration of the Taylor Grazing Act and in the execution of the Congressional intent. Review of the decision below thus becomes appropriate.

III. THE IMPORTANT QUESTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

The ruling below that the Secretary, "in his discretion, may refuse to sell for whatever reason he finds adequate" (p. 7a, *infra*) and that such a refusal "is not subject to judicial review" (p. 8a, *infra*) under the Administrative Procedure Act raises highly significant problems as to the right to judicial review. And the result reached would appear to be contrary to the relevant principles of judicial review established by this Court.

To classify the determination not to sell—after a high bid has been accepted from a qualified purchaser and the cash price has been paid—as an unreviewable discretionary act is, of course, to assume the basis point in issue. If the Secretary was bound under the law established by this Court to recognize petitioners' equi-

table titles and to issue patents to them, then his order vacating the sales was not discretionary; it was in plain violation of his powers and hence subject to judicial correction.

On the other hand, even if the Secretary's determination did partake of discretionary action, judicial review is not necessarily foreclosed. In *Ballinger* v. *United States ex rel. Frost,* 216 U.S. 240, 248, where this Court affirmed the action of the lower court in reviewing and disapproving the decision of the Secretary of the Interior not to issue a patent to Indian tribal land, the Court stated:

> "We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But, as said by Mr. Justice Field in Cornelius v. Kessel, 128 U.S. 456, 461: 'The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' "

And in the earlier decision in *Orchard* v. *Alexander,* 157 U.S. 372, 383, involving the discretionary determination of federal land officers as to the settlement on an improvement of public land under a pre-emption

claim, the Court held that such a determination was subject to judicial review on a claim of arbitrariness. See also *Adams* v. *Witmer,* 271 F. 2d 29 (C.A. 9).

More recently, in *Boesche* v. *Udall,* 373 U.S. 472, 485-486, this Court, in sustaining the discretionary power of the Secretary of the Interior to correct administrative errors by cancelling leases in administrative proceedings, was careful to note that "In so holding we do not open the door to administrative abuses. The regulations of the Department of the Interior provide for adversary proceedings on appeals taken within the department . . . And final action by the Secretary, see 43 CFR § 221.37, has always been subject to judicial review. 30 U.S.C. (Supp. IV, 1963), § 226-2; see, *e.g., Noble* v. *Union River Logging R. Co.,* 147 U.S. 165; *Moore* v. *Robbins,* 96 U.S. 530."

While recognizing that not every discretionary act is beyond the pale of judicial review, the court below ruled that the action of the Secretary in voiding the sales was so "committed to agency action" as to be excluded from the review provisions of § 10 of the Administrative Procedure Act. Quoting from *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317, the court felt that this determination involved "matters on which experts may disagree; they involve nice issues of judgment and choice, which require the exercise of informed discretion."

But petitioners' effort to secure judicial review was not bottomed on a debate as to whether it was sound judgment to sell these particular parcels on the basis of specified appraisals, as the court below would have it (see pp. 8a-9a, *infra*). Rather the effort stemmed from claims of arbitrariness and illegality unrelated

to such a nice issue of judgment and choice. Among such claims were:

1. *The claim that the orders vacating the sales were entered without notice or hearing as to the reappraisals.* There was a complete absence of any opportunity for these petitioners to challenge the orders administratively by rebutting the reappraisals. Certainly, where a party has what this Court has described as an equitable interest growing out of a cash sale, "he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing." *Orchard* v. *Alexander, supra,* 383.

(2) *The claim that the voiding of the sales on the sole ground that the Government had undervalued the land constituted an arbitrary act per se.* This Court has held that the Government cannot avoid a contract merely because it turns out to be a "bad bargain." *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 565-566; and see *Muschany* v. *United States,* 324 U.S. 49, 66-67. When the United States enters into contractual relationships, its rights and duties are governed generally by the law applicable to contracts between private individuals. *Lynch* v. *United States,* 292 U.S. 571. That principle should be no less true with respect to relationships stemming from sales of public land.

Such a claim, of course, would involve consideration of the unpublished public land conservation policy of the Secretary, promulgated on February 14, 1961, after the sales here in question, which was used as a reason for the sales cancellation. See Freeman R. 69. Under that policy, no land transaction was to be con-

summated if it developed that the Government would not receive full value; no party to such a transaction was to receive a windfall. Whether such a policy could be applied retroactively in these circumstances presents a most substantial and judicially reviewable question, particularly where, as here, the policy is executed through the use of secret, undivulged reappraisals.

(3) *The claim that, under res judicata principles, the Secretary was bound by the final administrative determinations that these petitioners were the purchasers of the lands.* More than two years elapsed from the date of the sale until the final administrative determination that petitioner Freeman, rather than preference-rights claimants, was the purchaser of the land; and the petitioner Ferry was subjected to prolonged administrative proceedings before the final determination was made in his favor as to the alleged unethical bidding. Had such administrative proceedings not been instituted by others than the petitioners and had not the proceedings been so prolonged, petitioners would without doubt have received their cash certificates and patents long prior to the announcement of the new land conservation policy.[12] See Freeman R. 91-92.

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[12] The absurdity of cancelling or ignoring substantial rights accruing upon the cash sale, due to delays in administrative procedures not of the purchaser's doing, was recognized by this Court in *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, 431-432:

"When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assualts of third parties."

In these circumstances, petitioners suggest that, under *res judicata* principles, the final determinations that petitioners were the qualified and proper purchasers of the lands should be binding upon the Secretary. See *Union Oil Co. of California, et al.*, 71 I.D. 169 (April 17, 1964), where the Department recognized the applicability of *res judicata* principles to administrative proceedings; and see *Stockley* v. *United States,* 260 U.S. 432, 544.

Such claims, combined with the charge that the Secretary acted without any competent reappraisal evidence, should be sufficient to warrant judicial review of the Secretary's action under § 10 of the Administrative Procedure Act, even though the action be considered discretionary in nature. And the failure of the courts below to provide such judicial review merits the full consideration of this Court. As this Court said in *United States* v. *Purcell Envelope Co.,* 249 U.S. 313, 318, "There must be a point of time at which discretion is exhausted .... and obligation takes its place." Petitioners' claim that such point had been passed justified judicial consideration.

CONCLUSION

The decision below is palpably erroneous. It disturbs decisions of this Court that for over one hundred years have carefully laid down rules establishing the rights of persons dealing with the Secretary of the Interior. It threatens the economic survival of the Western States and their citizens who are dependent upon the proper administration and disposal of public lands by the Secretary of the Interior.

Over seventy percent of the public lands in the State of Arizona are owned or controlled by the federal government, a large percentage of which is unavailable for acquisition because they are in forest reserves, Indian reservations or other types of withdrawals prohibiting their acquisition under the public land laws. The exploding day-to-day increase in population in the State of Arizona as well as other Western States makes these States appreciably dependent upon the proper administration of the public land laws for their economic welfare. If the sweeping powers of discretion and the exercise thereof are vested in the Secretary in the manner attributed to him by the court below, chaos in the administrative law field will result from the practice established in the present case. No one, including the States which may seek to have their lieu selection and exchange rights satisfied under the existing public land laws, could ever be certain of their rights and interests before the Department of the Interior. These rights have definitely been placed in jeopardy by the decision below. Surely confusion will be among the least of the undesirable results.

In order to avoid these chaotic and catastrophic results, as well as for the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 19, 1965.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,056

ROBERT V. FERRY, *Appellant,*

v.

STEWART L. UDALL, Secretary of the Interior, et al., *Appellees.*

No. 19,058

AUTRICE COPELAND FREEMAN, *Appellant,*

v.

STEWART L. UDALL, Secretary of the Interior, et al., *Appellees.*

[Sept. 9, 1964]

Appeals from the United States District Court for the District of Arizona

Before: HAMLEY, HAMLIN and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

Stewart L. Udall, Secretary of the United States Department of Interior (Secretary), and certain other individuals connected with the Department, were made defendants in these two cases brought in the District Court of Arizona. The first case (Freeman case) was filed on December 12, 1962, by Autrice Copeland Freeman. The second case (Ferry case) was filed on April 17, 1963, by Robert V. Ferry and Irving Baker, collectively referred to herein as Ferry. The plaintiffs in both cases sought district court review under the Administrative Procedure Act of decisions of defendants involving the administration and sale of public lands.

A summary judgment for defendants was entered in each case and on identical grounds. Because of the similarity in the facts involved and the identity of issues raised, the two cases were consolidated for the purposes of this appeal.

The essential facts in both cases are undisputed. The Secretary invited bidding on certain isolated tracts of public lands exposed for sale pursuant to authority vested in him under the Isolated Tracts Act, Rev. Stat. § 2455, as amended, 43 U.S.C. § 1171 (1958). Freeman and Ferry submitted bids on the particular tracts involved in their respective cases. In both cases they were declared by the Land Manager to be high bidder,[1] paid the bid price, and received receipts therefor.[2]

In prolonged proceedings which followed in the Freeman case, the Manager's decision that Freeman was the preferred bidder was affirmed by the Secretary, through his Solicitor, who, in his decision, declared Freeman "purchaser" of the land. And prolonged proceedings in the Ferry case, the Assistant Secretary of Interior resolved, in Ferry's favor, a challenge that the bidding was unethical, but remanded the case to the Land Manager for further consideration.

In each case, before the cash certificate was issued, the Secretary determined that the appraisal value of the lands in question had been understated and that the true value of the land at the time the bids were received was several

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[1] The declaration that they were high bidders and purchasers was, in each case, made ubject to a waiting period of thirty days to afford owners, if any, of contiguous land to exercise their preference right to purchase the land in accordance with the provisions of 43 U.S.C. § 1171 and 43 C.F.R. Part 250.

[2] Freeman was the only bidder in her case, and at the time of the bidding paid the bid price of $39,517.00 to the Manager, who issued a receipt to her.

Ferry at the time of the bidding paid the bid sum of $32,500.00, which sum was received and receipted by the Manager.

times higher than the bid price. On the basis of this, the Secretary entered orders vacating the sales.[3] Freeman and Ferry then instituted the actions involved in this appeal.

The numerous arguments advanced by Freeman and Ferry on this appeal present two basic issues: (1) whether Freeman and Ferry are entitled to the lands in question despite the fact that cash certificates have not been issued; and (2) whether it was an abuse of discretion, subject to review under section 10 of the Administrative Procedure Act, for the Secretary not to issue the cash certificates.

With regard to the first issue, we hold that Freeman and Ferry are not entitled to any property or contractual rights in the lands in question absent the issuance of the certificates. The Secretary has discretionary authority to decide whether "... in his judgment, it would be proper ..." to expose for sale at public auction, for not less than appraised value, certain isolated and disconnected tracts and parcels of public land. Isolated Tracts Act, Rev. Stat. § 2455, as amended, 43 U.S.C. § 1171.

The Act itself does not specify the procedure to be followed in selling these tracts. The Secretary may there-

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[3] In the Freeman case, on April 14, 1961, a joint decision of the Associate Director, approved by Secretary Udall, was rendered and issued vacating the sale on the ground that the then present value of the land exceeded the bid price by ten times. As a result of Freeman's petition for reconsideration of this decision, the Acting Director and Assistant Secretary on June 8, 1962, confirmed the earlier decision to vacate the sale on the grounds that the true value of the land at the time the bid was made exceeded the bid price by six times.

In the Ferry case, the Department of Interior ordered the sale to Ferry to be vacated in a decision dated February 1, 1963. The decision stated that the fair market value of the land at the date of sale was $93,500 as compared with the appraised value of $24,238.55. The fair value of the land was determined to be $155,880 as of September 4, 1962.

fore promulgate regulations, pursuant to his general rule-making power, concerning how the sale may be had. Rev. Stat. § 2478, 43 U.S.C. § 1201.[4] The rules promulgated with regard to these sales were, at the time of the bidding, as follows:

> ". . . until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."[5]

Under this procedure the Secretary, in the exercise of of his discretionary authority to sell, merely invites bids

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[4] Since the Secretary has discretionary power to refuse to sell at all, he also has the authority to set any conditions, consistent with the Act, upon which the sale may be made. Cf. *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 208. If the appellants did not like the system the Secretary established for entertaining bids, their remedy was that of not bidding at all. Cf. *Erie Coal & Coke Corp.* v. *United States*, 266 U.S. 518; *United States* v. *Weisbrod*, 7 Cir., 202 F. 2d 629, 633.

[5] This is the text of 43 C.F.R. § 250.5 as it stood at the time of the bidding, as a result of its promulgation at 19 Fed. Reg. 9116 (1954). The text was amended at 28 Fed. Reg. 1589 (1963).

One significant change in 43 C.F.R. § 250.5 made as a result of this amendment was that all public notices of sales under these regulations must now state expressly that the Government reserves a right to reject any and all bids prior to the issuance of the final certificates. The regulations prior to the amendment stated no such requirement, and the public notices in these two cases contained no such notice.

Freeman argues that the amendment reflects the Secretary's agreement with his position that this right of the Secretary to reject all bids must be stated in the public notice to be binding upon the bidders. The appellee answers that the purpose of the amendment was to prevent just such an argument as this one. Since we hold that this would have been an auction with reserve even without regulations or notice, we need not consider the merits of the foregoing arguments.

from the public. The procedure established resembles an auction with reserve, since the Secretary reserves the right to reject any and all bids prior to the issuance of the certificate. See Restatement, Contracts § 27; *Willcoxson* v. *United States,* D.C. Cir., 313 F.2d 884, 888.

Freeman argues that the public notice had to state that the auction was being held with reserve, in order for these conditions to be binding upon the bidders. However, in this kind of auction, as in any other, the auction is deemed to be conducted with reserve, unless there is an express announcement or advertisement to the contrary before the auction takes place. 1 Williston, Contracts (3d ed.) § 29, pages 76-77. For this reason, even without the regulations, the Secretary had a right to reject a bid. It would be immaterial whether the bid was the high bid or whether the advertisement announcing the auction implied that the Secretary would sell to the highest biller. See *Levinson* v. *United States,* 258 U.S. 198, 201.

The regulations state that offers to purchase the land could be accepted only by the issuance of the cash certificate and that no other action taken would confer rights in the land upon bidders. Both appellants argue that these regulations do not apply to them since the public notice did not call their attention to the fact that the auction was being held pursuant to 43 C.F.R. § 250.5. Freeman and Ferry are bound by these regulations, however, since their publication in the Federal Register provided constructive notice. 49 Stat. 502, 44 U.S.C. § 307; *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384-385; *Maryland Cas. Co.* v. *United States,* 251 U.S. 342, 349.

Two arguments advanced by the appellants are based on the presumption that some event other than the issuance of the cash certificate will constitute acceptance of their bids. The first such argument is that the obligation to sell lands became complete when the Land Manager accepted, and gave receipts for, the bid price paid by them. Ap-

pellants argue that the "general rule of real estate" applicable here is that where the applicant for a patent to public lands performs the prescribed conditions and pays the price, the equitable title thereto passes to the applicant and the United States thereafter holds mere legal title subject to a trust.

As pointed out in *Willcoxson* v. *United States,* D.C. Cir., 313 F.2d 884, 887-888, the cases upon which the appellants rely are those involving statutes which made it mandatory for the Secretary to transfer the land to those who complied with the statutory requirements, and which limited the Secretary's discretion to that of determining that the requirements had been met.[6]

Sale of property under the Isolated Tracts Act involves an entirely different method of disposing of public property. Under this Act, Congress has left entirely to the Secretary's discretion whether to dispose of the land or not. Accordingly, this is not a case where a member of the public can acquire parts of the public domain merely by the compliance with or paying a price. In this case, no right to the land arises until the Secretary accepts a bid by issuing a certificate.

The second argument along this line is that the offers of the appellants were accepted when they were declared to be "high bidder" and "purchaser." The significance of this, they argue, is that 43 C.F.R. § 250.5 is directed only to "applicants" and "bidders" and, by being designated "purchasers," they were put in a category of persons to whom the regulations do not apply. The argument overlooks the fact that 43 C.F.R. § 250.5 expressly states that bids are accepted only by the issuance of the cash certificate

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[6] The cases relied upon in this argument are *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.,* 145 U.S. 428, and *Wyoming* v. *United States,* 255 U.S. 489, both discussed later in this opinion.

and that no other action "taken will create any contractual or other obligation of the United States."[7]

The result we reach is identical in principle with that of *Willcoxson* v. *United States*, D.C. Cir., 313 F.2d 884. Freeman, however, seeks to distinguish the *Willcoxson* case from the one before us. First, he argues, the Secretary decided not to sell in *Willcoxson* because minerals were discovered on the land after the bids were made, because there were adverse claimants to the land and issuance of the certificate would have resulted in litigation, and because there were irregularities in the application, whereas in this case, the Secretary refused to sell because the bid price was less than the actual value of the land. In our view, however, the difference in reason given for refusing to sell is no basis for distinguishing the cases, since the Secretary, in his discretion, may refuse to sell for whatever reason he finds adequate.

Second, Freeman argues, the cases are distinguishable because the relief sought in *Willcoxson*, was "in the nature of mandamus and under the Tort Claims Act," while in this case relief is sought under the Administrative Procedure Act. However, whether or not there is a binding obligation to sell the land prior to the issuance of the cash certificate is a question of substantive law, the answer to which will be the same without regard to what procedure is used to raise the question.

For these reasons we agree with *Willcoxson* v. *United States*, D.C. Cir., 313 F.2d 884, and hold that the appellants are not entitled to the lands in question absence issuance of the certificate.

With regard to the second issue raised on this appeal, we hold that the Secretary's refusal to issue these cer-

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[7] Similarly, neither the issuance of a receipt for the bid price paid, nor the subsequent affirmation of the Manager's declaration by the Assistant Secretary or the Secretary of Interior amounted to an acceptance of the bids.

tificates is not subject to judicial review. The Isolated Tracts Act commits the decision to sell to the Secretary's discretion. Under the regulations adopted to administer the Act, the Secretary reserved the right to exercise that discretion any time before a bid had been accepted by the issuance of the cash certificate. Since section 10 of the Administrative Procedure Act[8] prohibits judicial review of agency action ". . . by law committed to agency discretion . . .," we are without power to reveiw the Secretary's decision in this case.

We recognize the intrinsic difficulty in determining whether a discretionary action of an agency is reviewable. Almost every agency action involves some degree of discretion of judgment. Yet it cannot be said that, for this reason, every agency action is unreviewable. *Homovich* v. *Chapman*, D.C. Cir., 191 F.2d 761, 764. The analytical problem is that of determining when the agency action is "committed to agency discretion" within the meaning of section 10 of the Administrative Procedure Act, and when it merely "involves" discretion which is nevertheless reviewable. 4 Davis, Administrative Law Treatise § 28.16, pp. 80-81; Anno., Administrative Procedure Act, 97 L.Ed. 884, 889.

Our decision that the Secretary's decision is "committed" to his discretion is consistent with *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309. There it was held that the courts could not review toll rates set by the Panama Canal Company because toll adjustments were a matter left to the discretion of the Company. It was determined that this decisional process was committed to the Company's discretion because it involved ". . . matters on which experts may disagree; they involve nice issues of judgment and choice, which require the exercise of informed discretion." (356 U.S. at 317, citations omitted) Similarly, a decision of whether or not it would be in keeping with

[8] 60 Stat. 243, 5 U.S.C. § 1009.

sound policy to sell a particular parcel of land at a certain offered price involves the exercise of informed discretion.

That the case of *Panama Canal Co.* v. *Grace Lines, Inc., supra,* is analogous in principle with the instant case is confirmed by the fact that in *Panama* (356 U.S. at 317) the Court relied upon its former decision of *United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414. It was in this earlier case that the Court, in considering the reviewability of land disposal decisions of the Secretary of Interior, drew "the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion." (283 U.S. at 418) It was decided that the courts could not, by writ of mandamus, review a decision of the Secretary denying applications for permits to prospect for oil and gas under section 13 of the Mineral Leasing Act of 1920 because that section was permissive in nature.[9]

The necessary implication is that courts may not review a decision committed to the Secretary's discretion pursuant to a "permissive type" statute, while they may do so where the decision was made pursuant to a "mandatory type" statute, even though the latter decision involves some degree of discretion.

Although *Wilbur* is distinguishable on the ground that it was decided before the Administrative Procedure Act was enacted, the decision in *Panama Canal Co.* v. *Grace Lines, Inc., supra,* indicates that the rules governing the reviewability of the Secretary's discretionary decisions by writ of mandamus obtain equally when review is attempted under section 10 of the Administrative Procedure Act.

It is just this distinction drawn in the *Wilbur* decision that differentiates the instant case from two categories of

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[9] The text of section 13 of the Mineral Leasing Act as it stood upon the date of the *Wilbur* decision can be found at 41 Stat. 441. The section was thereafter amended and expired by the terms of that amendment. Act of August 21, 1935, 49 Stat. 674.

cases relied upon by the appellants. The first category of cases concerns application for patents covering mineral claims pursuant to the Mineral Locations Law of 1872, Rev. Stat. §§ 2318-2326, as amended, 30 U.S.C. §§ 21-30.[10] The Act makes mandatory the granting of estates to those who locate mineral claims in the public domain, conditioned upon the compliance by the locator with statutory requirements.[11] The discretian of the Secretary is limited to deciding whether these requirements have been met. Judicial review of the Secretary's decision in this matter is available, since it would be anomalous to allow a locator to lose rights, the conferring of which is made mandatory by the applicable statute, merely because authorized personnel in the Department of Interior made erroneous or arbitrary decisions concerning the locator's compliance with the law. See *Adams* v. *Witmer*, 9 Cir., 271 F.2d 29, 34.

The second category involves a case construing two statutes concerned with the admission of Wyoming to statehood. *Wyoming* v. *United States*, 255 U.S. 489. In substance, the statute granted Wyoming the right to select certain sections of the public domain for support of that state's common schools. The state made a selection in ac-

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[10] The cited cases include *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334; *Cameron* v. *United States*, 252 U.S. 450; *Adams* v. *Witmer*, 9 Cir., 271 F. 2d 29. Additionally cited is *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U.S. 428 which involves an interpretation of this Act.

[11] Some salient features of the Act are that all valuable mineral deposits in the lands of the United States are open to exploration and purchase (Rev. Stat. § 2319, as amended, 30 U.S.C. § 22), that the Government, in effect, grants the right to present and exclusive possession to the surface, as well as to the minerals below the surface, to locators of minerals below the surface, to locators of mineral claims (Rev. Stat. § 2322, 30 U.S.C. § 26); and that the locator of mineral claims may proceed to obtain a patent according to specified procedures (Rev. Stat. § 2325, as amended, 30 U.S.C. § 29). See *United States* v. *Rizzinelli, D. Idaho*, 182 Fed. 675, 681.

cordance with the statutes. Years later the General Land Office attempted to cancel the selections. The Supreme Court held that the statutes constituted an offer to Wyoming, the compliance with which became mandatory once the state accepted the offer in accordance with the statutes. The discretion of the Department of Interior was limited solely to determining whether the statutory conditions had been met. The Court decided that the Secretary had erred in attempting to cancel the selections, and affirmed a district court decision favorable to the state's claim of title.

But, argues Ferry, section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782, 30 U.S.C. § 226, is a permissive, rather than a mandatory type statute, and yet there are cases judicially reviewing the granting and denying of non-competitive oil and gas leases under that section.

While the pertinent part of that section uses mandatory language to state that the first qualified applicant for an oil or gas lease not within a known geological structure, of a producing field "shall be entitled" to a preference right without competitive bidding,[12] the entire section uses the permissive language that lands known or believed to contain oil or gas "may be leased" by the Secretary. For this reason, it has been held that the denying of lease applications under this section is a matter of the Secretary's discretion and not subject to correction by judicial review. *United States* v. *Ickes*, D.C. Cir., 101 F.2d 248. Similarly, it has been held that an applicant for a non-competitive lease obtains no vested rights until the Secretary in his discretion accepts the application. *Haley* v. *Seaton*, D.C. Cir., 281 F.2d 620.

The cases which Ferry cites in this connection do not involve review of the exercise of discretion not to accept

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[12] The pertinent part of section 17 of the Mineral Leasing Act was added by 49 Stat. 676, amended 60 Stat. 951, and amended 74 Stat. 782.

lease applications under this section. The review has been limited solely to determining whether, once the Secretary decided to accept leases, the leases were granted to the proper applicants in accordance with the mandatory language of the statute and applicable regulations.[13] See *Barash* v. *Seaton*, D.C. Cir., 256 F.2d 714; *Seaton* v. *Texas Co.*, D.C. Cir., 256 F.2d 718; *McKay* v *Wahlenmaier*, D.C. Cir., 226 F.2d 35. Additionally courts entertain suits to determine whether the regulations promulgated to administer the Act are consistent with the mandatory requirements of the Act. See *Thor-Wesicliffe Development Inc.* v. *Udall*, D.C. Cir., 314 F.2d 257; *Saffrick* v. *Udall*, D.C. Cir., 304 F.2d 944.

There is a further argument. Under the Mineral Leasing act, it is contended, the unreviewable discretionary authority of the Secretary is exhausted when he decides to accept noncompetitive oil and gas lease applications; thereafter his acts are subject to review. In the same way, it is urged, the unreviewable discretion of the Secretary is exhausted when he decided to expose certain isolated tracts for sale, and any decision he makes thereafter is reviewable for abuse of discretion.

Appellants' understanding of the Mineral Leasing Act is correct insofar as, once the Secretary has decided to accept lease applications, the Act makes mandatory the granting of the lease to the first qualified applicant without competitive bidding. But the argument with regard to the scope of the Secretary's discretion under the Isolated Tracts Act is faulty. It overlooks the fact that there is nothing in the Act or regulations which makes the accepting of any bid mandatory after the decision to expose the

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[13] Although section 17 is a permissive statute, it was observed in *McKay* v. *Wahlenmaier*, D.C. Cir., 226 F. 2d 35, 39, that "[s]ection 17 is mandatory in directing that a lease be issued to the person (a) who first makes application and (b) who is qualified under certain other sections of the Act to hold a lease."

land for sale or to invite bidding is made. For this reason, the Secretary's discretion under the Isolated Tracts Act, unlike his discretion under the Mineral Leasing Act, extends until such time as he accepts in accordance with the regulations some bid made on a parcel of land designated for sale.

Ferry argues that due process of law requires that he at least be given a hearing on the issue of the fairness of the original appraisal. Since the Secretary announced that he rejected Ferry's offer because it was less than the actual value of the land when the bids were made, Ferry argues that he ought to have an opportunity to demonstrate the error of this determination in a trial-like procedure. We know of no provision in the Isolated Tracts Act that requires such a hearing. Furthermore, there is no constitutional requirement to a right to a hearing where only a potential privilege to purchase United States land is involved.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MAY 1963 TERM

MINUTE ENTRY OF
TUESDAY, SEPTEMBER 3, 1963
(Tucson Division)

HONORABLE JAMES A. WALSH, UNITED STATES DISTRICT JUDGE, PRESIDING

Civ-1648

ROBERT V. FERRY, individually and as agent for Irving Baker, and IRVING BAKER, as their interests may appear,
Plaintiffs,

vs.

STEWART L. UDALL, Secretary of the United State Department of the Interior, et al., *Defendants.*

Plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

No cash certificate having issued to plaintiffs, no contractual rights arose between plaintiffs and the United States, no equitable title to the tract involved herein vested in plaintiffs, and no rights in such tract ever vested in plaintiffs. Accordingly, when the defendant Secretary of the Interior determined, in the exercise of his discretion, that the fair market value of the tract on the date it was offered for sale, viz.: *April 18,* 1958, exceeded the sum bid for the tract by plaintiff, he had the right to decide not to sell the tract; and his action in so deciding is not reviewable herein. *Willcoxson* v. *United States,* 313 F. 2d 884 (C. A. D. C.); *Haley* v. *Seaton,* 281 F. 2d 620 (C. A., D. C.); Section 1009, Title 5, United States Code.

The clerk is directed to enter judgment herein forthwith that plaintiffs take nothing by the complaint herein and that the action be dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MAY 1963 TERM

MINUTE ENTRY OF
TUESDAY, SEPTEMBER 3, 1963
(Tucson Division)
AT TUCSON

HONORABLE JAMES A. WALSH, UNITED STATES DISTRICT JUDGE, PRESIDING

Civ-1578

AUTRICE COPELAND FREEMAN (formerly AUTRICE C. COPELAND), wife of HERMAN FREEMAN, dealing with her sole and separate property, *Plaintiff*,

vs.

STEWART L. UDALL, as Secretary of the United States Department of the Interior, et al., *Defendants*.

Plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

No cash certificate having issued to plaintiffs, no contractual rights arose between plaintiffs and the United States, no equitable title to the tract involved herein vested in plaintiffs, and no rights in such tract ever vested in plaintiffs. Accordingly, when the defendant Secretary of the Interior determined, in the exercise of his discretion, that the fair market value of the tract on the date it was offered for sale, viz.: *August 28*, 1958, exceeded the sum bid for the tract by plaintiff, he had the right to decide not to sell the tract; and his action in so deciding is not reviewable herein. *Willcoxson* v. *United States*, 313 F. 2d 884 (C. A. D. C.); *Haley* v. *Seaton*, 281 F. 2d 620 (C. A., D. C.); Section 1009, Title 5, United States Code.

The clerk is directed to enter judgment herein forthwith that plaintiffs take nothing by the complaint herein and that the action be dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER AND AUTRICE COPELAND FREEMAN, PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 336 F. 2d 706. The opinions of the district court are not reported. They are set forth at pages 14a–15a of Petitioners' Appendix.

JURISDICTION

The judgments of the court of appeals were entered on September 9, 1964 (Pet. App. 1a). Timely petitions for rehearing *en banc* were denied on October 21, 1964. On January 21, 1965, Mr. Justice Douglas signed an order extending the time for petitioning

for a writ of certiorari to March 20, 1965. The instant petition was filed on March 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Acting under a statute empowering the Secretary of the Interior to sell at public auction isolated tracts of public lands "which, in his judgment, it would be proper to expose for sale," and to execute this task by means of "appropriate regulations," the Secretary issued a regulation specifying that no rights of any kind accrue to a prospective purchaser until a cash certificate has been issued to him. The question presented is whether this regulation is valid.

STATUTES AND REGULATIONS INVOLVED

Section 2455, Revised Statutes, as amended, 43 U.S.C. 1171, referred to herein as the "Isolated Tracts Act," provides:

> *Sale of isolated or disconnected tracts.* Notwithstanding the provisions of section 678 of this title and of sections 212, 321, 662, and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated * * *.

Section 2478, Revised Statutes, as amended, 43 U.S.C. 1201, provides:

> *Power of Secretary or designated officer.* The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

The regulation of the Secretary of the Interior involved is 43 C.F.R. (1954 rev.) 250.5, which provides:

> *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.

Section 250.12(c) of the Secretary's regulations (43 C.F.R.) provides:

> When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

STATEMENT

The petition in this case relates to two separate actions founded on similar factual situations and presenting the same basic issue of law. The district

court entered summary judgment for the defendants, the Secretary of the Interior and his subordinate officials, in each case and on identical grounds (Pet. App. 14a–15a). The actions were consolidated in the court of appeals (Pet. App. 1a). The essential facts are as follows:

The Secretary invited bidding on certain isolated tracts of public lands exposed for sale pursuant to his authority under the Isolated Tracts Act, R.S. Sec. 2455, as amended, 43 U.S.C. 1171 (Ferry R. 102; Freeman R. 58). Ferry and Freeman submitted bids on the particular tract involved in their respective cases. Each was declared by the local Land Manager to be the high bidder, paid the bid price, and received a receipt therefor (Ferry R. 79; Freeman R. 107–109). Following prolonged proceedings within the Interior Department to resolve challenges by other individuals to the rights of Ferry and Freeman to receive the tracts, the Secretary upheld the Manager (Ferry R. 27–31; Freeman R. 96–100). In each case, however, before a cash certificate was issued and following an investigation directed by the Secretary, the Secretary determined that the proper appraised value of the land at the time the bids were received was several times higher than the bid price.[1] For

[1] In the *Ferry* case, the original Bureau appraisal, made some time before the bidding, was $24,235.55; the bid was $32,500; and the subsequent appraisal made as of the date of the bidding was $93,500 (Pet. App. 2a–3a). In the *Freeman* case, the original Bureau appraisal was $39,516.40; the bid was $39,517; and the subsequent appraisal made as of the date of bidding exceeded the bid by more than six times (Freeman R. 88, 93; Pet. App. 2a–3a).

that reason, the Secretary vacated the sales (Ferry R. 36; Freeman R. 88; Pet. App. 3a).

Ferry and Freeman then brought these actions for relief under the Administrative Procedure Act, 5 U.S.C. 1009. The district court granted summary judgment for the defendants on the basis of the Secretary's regulation (43 C.F.R. 250.5), which provides that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold * * * and no action taken will create any contractual or other obligation of the United States." Since the alleged sales in the present case had not been completed by the issuance of the required cash certificates, by the very terms of the regulation the Secretary at all times retained his statutory authority "to determine that the lands should not be sold" and the petitioners obtained "no contractual or other rights as against the United States" (43 C.F.R. 250.5). In short, petitioners' offers were never accepted and they obtained neither legal nor equitable rights to the lands (Pet. App. 14a–15a). The court of appeals affirmed (Pet. App. 1a–13a).

ARGUMENT

The decisions of both courts below are plainly correct and are not in conflict with the decision of any other court. Accordingly, there is no occasion for further review.

1. This Court recently denied review of an almost identical holding in *Willcoxson* v. *United States,* 313

F. 2d 884 (C.A.D.C.), certiorari denied, 373 U.S. 932.[2] Here, as in *Willcoxson*, the complete answer to petitioners' reasoning and authorities is that Congress, in giving the Secretary of the Interior unqualified discretion to decide whether and when a particular isolated tract should be sold at auction, necessarily clothed him with authority to prescribe the terms of the sale and, specifically, to designate what action on his part would constitute a definitive acceptance of an applicant's offer to buy. Cf. *Erie Coal & Coke Corp.* v. *United States*, 266 U.S. 518, 520-521; Restatement of Contracts, Sec. 27. Here, the Secretary provided by regulation (43 C.F.R. 250.5), that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States." It was subject to this reservation that the lands were offered and petitioners invited to bid. The regulation plainly states that prior to the issuance of a cash certificate no rights accrue

[2] In *Willcoxson*, the Secretary refused to complete the "sale" under the Isolated Tracts Act on discovering that the lands contained valuable minerals because he believed that he was prohibited by the mining laws, 30 U.S.C. 21 *et seq.*, from selling such lands. Here, the Secretary has taken the same action because he believed that, by the terms of the Isolated Tracts Act itself, he was prohibited from selling the lands at less than their fairly appraised market value. Thus, contrary to petitioners' contention (Pet. 27), the two cases are fully parallel and, as the court below said (Pet. App. 7a), the "result we reach is identical in principle with that of *Willcoxson*."

to a bidder, even though he might be called a "purchaser," as a result of preliminary "action taken" on the bidding.

The auction notices expressly made bidding subject to the provisions of the Isolated Tracts Act (Ferry R. 102; Freeman R. 58). Prospective applicants were thus put on notice of the applicability not only of the statute but also of the regulations adopted expressly pursuant to and in execution of the Isolated Tracts Act (43 C.F.R. 250.1). Cf. *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 626. Indeed, the appearance of these regulations in the Federal Register alone gave legal notice of their content to all affected thereby, consequently binding each petitioner herein. 44 U.S.C. 307. If petitioners considered the reservation unacceptable, they were free not to bid.

Finally, there is, of course, no conflict between the regulation relied upon in this case, 43 C.F.R. 250.5, and a further regulation providing that "when there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser." 43 C.F.R. 250.12(c). The latter regulation authorizes the manager to issue a cash certificate when all the requirements of the statute and regulations have been complied with. Section 250.5 is intended to prevent the creation of any rights against the United States pending a final decision by the Department of the Interior and formal acceptance of the applicant's offer so that the Secretary may take into account any facts or events coming to his attention between the time of his initial decision to sell the

land and his final acceptance of an offer by issuance of a cash certificate. The use made of Section 250.5 in the present case and in *Willcoxson* is the very purpose of the provision. The regulation is an eminently reasonable protection of the public interest and does not conflict in any way with the legitimate rights or expectations of private individuals.

2. Petitioners' contention (Pet. 18–26) that the decisions below are in conflict with decisions of this Court is groundless. *Wyoming* v. *United States*, 255 U.S. 489—upon which they chiefly rely—arose under a statute whereby Congress itself appropriated certain lands for selection by the States, leaving to the land officers merely the nondiscretionary task of ascertaining whether the State's selection met the requirements of the congressional offer. Since the selection was not "merely a proposal by the State which the land officers could accept or reject," and since the "power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised * * *" (*id.* at 496), the Court held that equitable title vested at the time of the selection and not at the time of the officers' later approval. Here, the crucial distinction, as the court below recognized (Pet. App. 4a–5a, 12a–13a), is that the Isolated Tracts Act entrusted to the Secretary's discretion the very decision that was outside his authority in the *Wyoming* case—whether to sell the tracts at all; petitioners' application was merely a proposal which the Secretary was free to accept or

reject, and in a manner defined by him in advance. See *United States* v. *Ickes,* 72 F. 2d 71, 73–76 (C.A.D.C.).

Statements in the *Wyoming* case that the right to the land vests when the price is paid (Pet. 19, 21) were merely descriptions of the legal consequences of a cash entry under statutes where the Secretary has no authority to refuse to sell or lease land. In this situation, the applicant's rights vest by virtue of the statutory grant upon compliance with the statute's requirements. As the Court of Appeals for the District of Columbia noted in *Willcoxson,* the situation is entirely different under the Isolated Tracts Act: "An application for sale of an isolated tract is 'merely a proposal by the [applicant] which the land officers [can] accept or reject.' *Wyoming* v. *United States, supra,* 255 U.S. at 496. By providing that the authorized land officer may decide not to sell at any time prior to the issuance of a cash certificate, the regulation in effect denotes issuance of the certificate as acceptance of the applicant's proposal. In ordinary contract parlance, the sales were auctions with reserve. Restatement, Contracts § 27. Until acceptance, no contract rights arose and no equitable title vested. The *Wyoming* and similar cases cut off from consideration only facts arising after the vesting of rights. In the present case, since no rights in the tracts ever vested, the Manager was free to consider any facts discovered before the issuance of a cash certificate." 313 F. 2d at 888.

Similarly, the statements relied upon by petitioners (Pet. 18–26) from earlier cases—none of which involved the issue presented here—were simply descriptive of the cash-sale procedures there applicable—procedures under different statutes in cases antedating adoption of the regulation which is controlling in this case.[3]

3. The court below correctly accorded no validity to petitioners' effort (Pet. 29–33) to find in various provisions of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, severe limitations on the discretion conferred upon the executive officer in the Isolated Tracts Act, 43 U.S.C. 1171. The discretionary provision of the Isolated Tracts Act has been in effect since 1846 (Sec. 2455, Revised Statutes), long antedating the Taylor

[3] All of the cases are readily distinguishable. For example: *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, involved a dispute between applicants for a patent to mineral lands and a subsequent locator. The Court held (pp. 431–432) that "when the price is paid the right to a patent immediately arises" because Section 2325, Revised Statutes, pertaining to mineral lands, provided, with respect to mineral lands, that "it shall be assumed that the applicant is entitled to a patent, upon payment to the proper officer * * *." There is no such provision in the present statute. In *Carroll* v. *Safford*, 3 How. 441, the Court held that, where a purchaser had paid the price for public land and been granted a patent certificate but not yet the patent itself, Michigan could tax the property because the purchaser "held for it a final certificate, which could no more be cancelled by the United States than a patent" (p. 460). No such certificate has been issued in the present case. In *Atherton* v. *Fowler*, 96 U.S. 513, the principal issue was whether a person who had entered upon land by forcefully dispossessing a prior occupant could succeed to the latter's rights of pre-emption, the Court holding not. Neither *John W. Stanton*, 50 I.D. 242, nor *State of Wisconsin, et al.*, 65 I.D. 265, treated a regulation like that involved here.

Act. It remains unchanged to the present day. The fact that in 1934 the Taylor Grazing Act (Section 14) was used as a means of enlarging (by amendment) the acreages permitted to be sold and of changing the fixed per-acre price to an appraised price did not affect the discretion of "the Secretary of the Interior to order into market and sell at public auction" isolated tracts "which, in his judgment, it would be proper to expose for sale." Nothing adverted to by petitioners in the Taylor Grazing Act or elsewhere has amended or qualified the long-standing general discretion clearly set forth in that language.

4. Petitioners' contentions that they were entitled to a hearing and to judicial review under the Administrative Procedure Act are premised on the assumptions that they had "an equitable interest" and that "the Government cannot avoid a contract" (Pet. 36). But, under Section 250.5 of the Secretary's regulations, "until the issuance of a cash certificate * * * the applicant or any bidder has no contractual rights as against the United States, and no action taken will create any contractual or other obligation of the United States." The validity of this regulation and thus the existence *vel non* of contract rights of the petitioners was, of course, litigated before and decided by the courts below. The petitioners are not entitled to an administrative hearing or judicial review of the question whether the Secretary should have accepted their offers. As the court below held (Pet. App. 13a), "there is no constitutional requirement to a right to a hearing where only a potential privilege to purchase United States land is involved." Finally, Section 10

of the Administrative Procedure Act, 5 U.S.C. 1009, excepts from judicial review agency action which is by law committed to agency discretion. The administrative action taken in the present case—the decision not to accept petitioners offers—plainly falls into this category, as the court below held.

The Isolated Tracts Act neither instructs the Secretary as to whether or when he should dispose of the property nor requires that he furnish any reason for his decision not to dispose of it. Similarly, the Secretary's regulations contain no requirement that he reveal the bases of his decision not to dispose of such isolated tracts. In short, the Secretary is not required by any provision of law to explain the reasons for his decision that the disposal of particular land would be contrary to the public interest. Consequently, potential vendees, who by the explicit terms of the regulations have no legal or equitable rights before issuance of a cash certificate, cannot demand to be heard either before or after the Secretary has exercised this wholly discretionary function.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER and
AUTRICE COPELAND FREEMAN, *Petitioners,*

v.

STEWART L. UDALL, Secretary of the Interior, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ARIZONA, URGING THAT THE WRIT OF CERTIORARI ISSUE.

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QUESTIONS PRESENTED

1. Whether any rights accrue to an applicant to purchase land under Sections 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c.865, 48 Stat. 1272, and Act of June 28, 1934, c.865, 48 Stat. 1274, now appearing as 43 USC. 315(f) and 43 USC. 1171) prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification, of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, c.324, 60 Stat. 243, which now appears as 5 USC. 1009).

INTEREST OF AMICUS CURIAE

The United States Court of Appeals for the Ninth Circuit, in Ferry vs. Udall, the decision here appealed from, answered the first question as presented by this amicus curiae in the negative, and the second in the affirmative. This amicus curiae feels that said honorable court erred.

This decision has a far reaching effect upon the whole Taylor Grazing Act, and possibly other land disposal laws recently enacted.

The case dealt specifically with Section 14 of the Act, however, said section can only be implemented by use of Section 7 of the Act, a fact which was not discussed by the Ninth Circuit.

If the activities of the Secretary, pursuant to Section 7, are, in all instances within his complete and unreviewable discretion, with no right accruing to the applicant until the issuance of cash certificate, then the State of Arizona is in the same position with regard to exchanges under Section 8 (c) of The Taylor Grazing Act, 43 USC.315 (g), since the authority to receive and process an application is governed by Section 7 of said Act.

Recent legisation has been enacted to provide temporary authority for the sale of certain public lan[illegible] (Act of September 19, 1964, 78 Stat. 988, and 78 Stat. 989) to political subdivisions and others and to allow regulations to be promulgated by the Secretary to implement such disposals (Act of September 19, 1964, 78 Stat. 986).

The Ninth Circuit's decision in this case, and the decision in *Willcoxson* vs. *United States*, 313 Fed. 2d, 884, have already affected the Secretary, as may be seen in new regulations set up by the Secretary.[1]

[1]These new regulations, pursuant to the recent legislation, as none before, indicate the absolute arbitrary authority which the Secretary feels he has, under land disposal statutes. 43 CFR, part 2240, dealing with sales and exchanges, sub-part 2243 dealing with public sales, states as follows: "Section 2243.2-5 Sales through competitive bidding: Time, place, simultaneous bids. If classified lands are offered to competitive bidding: . . . (e) the acceptance of an offer to purchase will be by the issuance of a final certificate to the bidder. Until the final certificate is issued, the authorized

In other words, the effect of these decisions is to create uncertainty of acquisition, no matter what the applicant has done, until cash certificate or patent is issued. Throughout all the proceedings, which may be quite time consuming due to administrative processing, the Secretary may, for any reason, change his mind, and his reasons are not even subject to review.[2]

It is our contention that such power by the Secretary negates the basic purpose of The Taylor Grazing Act in requiring the Secretary, among other things, to dispose of unused Federal land, properly classified, to the states and the citizens thereof.[3]

One question involved here is whether or not there is any discretion of the Secretary left after classification of the land as suitable for sale and public auction or application for exchange thereof, and acceptance of the land offered in exchange. But even if said discretion exists, the decision of the Ninth Circuit stating

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officer has the right at any time to determine that the land should not be sold or that any and all bids should be rejected. *Generally*, if the high bid is not less than the fair market value of the land on the date for receiving bids, as specified in the public notice issued pursuant to Section 2243.2-4 (b), any appreciation or depreciation thereafter in value of the lands will *not necessarily* be a basis for a determination that the land will not be sold . . . ." (Emphasis supplied). As can be seen, this regulation goes much farther than 43 CFR.250.5 which is at issue in this case. This regulation, in effect, makes disposition absolutely discretionary with the Secretary of the Interior even though the statute states: ". . . The Secretary of the Interior is authorized *and directed* to dispose of public lands that have been classified for disposal . . . ." (Emphasis supplied) 78 Stat. 988 and 78 Stat. 989.

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[2]This is shown by the fact that in the Ferry-Baker case, as in the Freeman case, almost three years elapsed between the time of sale and the refusal of sale for reasons not in existence at the time of the sale.

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[3]"There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program." U.S. Code Congressional Service, 80th Congress, First Session, 1946, page 1510.

that said discretion is not reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, C.324, 60 Stat. 243, 5 USC Sec. 1009) has the effect of destorying any certainty of orderly processing of applications for sale or exchanges of property under The Taylor Grazing Act. In this regard, the various states' interest is as vitally affected under Section 8 (c) of The Taylor Grazing Act as that of a private applicant's for a cash sale under Sections 7 and 14 of said Act.

The State of Arizona contains 72,688,000 acres of land.[4]

Of this land, 15.58% is privately owned, 12.76% is state owned, and 71.66% is owned, controlled or held in trust by the Federal government.[5] Even if Federal land used for such purposes as national forests, parks, Indian reservations, military uses, etc., is excluded, there is more unused Federal land in the state of Arizona than privately owned land.[6] This land is not being developed. It pays no taxes to the state. It is, without further development by private capital, a burden to all concerned.

Therefore, the state of Arizona, and many other western states, are effectively land-locked unless there is orderly disposal of unused Federal land to those states and the citizens of those states.

And what has been the effect of giving the Secretary unbridled discretion? The result can be clearly seen by looking at the Bureau of Land Management's own statistics concerning patents issued and land sold under Section 14 of The Taylor Grazing Act from the years 1958 to 1963:[7]

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[4]1963 Public Lands Statistics, U.S. Dept. of the Interior, Table 1, Page 3.

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[5]1963 Public Lands Statistics, U.S. Dept. of the Interior, Table 7, Page 12; Arizona Statistical Review, 20th Annual Edition, September 1964, Research Department, Valley National Bank, Page 36.

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[6]Ibid.

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[7]1963 Public Lands Statistics U.S. Dept. of the Interior, Table 17.

Fiscal Year	Patents Issued	Acreage
1958	60	15,378.67
1959	95	15,939.11
1960	59	10,107.96
1961	4	535.06
1962	2	715.69
1963	9	1,360

The Taylor Grazing Act exchanges in Arizona under Section 8 of the Act, which are subject to classification and processing under Section 7 of the Act, from 1958 to 1963, are as follows:[8]

Fiscal Year	Total Exchanges	Selected Acreage
1958	15	5,896.55
1959	20	27,791.45
1960	8	55,053.11
1961	0	0
1962	1	3,441.66
1963	2	1,280

The vacant public domain lands in Arizona under the exclusive jurisdiction of the Bureau of Land Management at the end of the fiscal year 1959 were 12,452,888 acres. At the end of the fiscal year 1963, the figure was 12,401,877 acres.[9] This represents a total reduction of vacant public domain in Arizona, said lands being transferred to state or private ownership, of 51,011 acres, or less than one-half of 1% over a five year period, or less than one-tenth of 1% per year. At this rate, it would take the Bureau of Land Management 1,215 years to dispose of all the public domain lands in Arizona. Thus, the interest of the state

[8]Public Lands Statistics, U.S. Dept. of the Interior, Table 25.

[9]Public Lands Statistics, U.S. Dept. of the Interior, Table 11.

can clearly be seen. The unbridled discretion of the Secretary of the Interior under The Taylor Grazing Act has not only thwarted state exchanges, it has thwarted private exchanges and cash sales at private auction, all to the detriment of the economy of this state.

ARGUMENT

The appellants in this cause have stated good reasons for granting the Writ of Certiorari in this case, and said reasons are hereby supported by this Amicus Curiae.

Further, the statement of this Amicus Curiae's interest in this matter shows the importance of the determination of this cause by this court. The Circuit Court was wrong in determining the two questions presented by this Amicus Curiae as it did. The determination of these questions has far reaching effects upon the land disposal laws of the United States, and the power of the Secretary of the Interior and his department.

I. FAILURE TO RECOGNIZE RIGHTS WHICH APPLICANTS HAVE UNDER SECTIONS 7 AND 14 OF THE TAYLOR GRAZING ACT, AND REGULATIONS PURSUANT THERETO.

(a) Rights Under the Act.

If the Court properly examines the statutes involved, it will find that the sale of public lands under the Isolated Tracts Act, Revised Statutes, Sec. 2455 as amended; 43 USC.1171, is controlled by The Taylor Grazing Act, because the Isolated Tracts Act is Sec. 14 of The Taylor Grazing Act (43 USC. 1171).

In order to even make application for a sale of public domain lands, use has to be made of Section 7 of The Taylor Grazing Act, as well as the said Section 14 thereof, Section 7 being the so-called "Classification Section" of The Taylor Grazing Act. The enacting clause of Section 1 of The Taylor Grazing Act is both mandatory and discretionary. In it, Congress directs the Secretary to stop injury to the public grazing lands etc., and "in order to pro-

mote the highest use to the public grazing lands pending its final disposal, the Secretary of the Interior is authorized in his discretion to establish grazing districts". This he did. And in order to get any of the lands out for any disposal, one has to look to the classification authority and process under Section 7 of this Act, which is to say, 43 USC. 315 (f). Section 7 of The Taylor Grazing Act, as it stood at the time of filing of the application for the subject disposal of public lands in this case, said:

> "Section 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify lands withdrawn or reserved . . . or within a grazing district . . . Provided, that upon the application of any applicant qualified to make entry, selection, or location, under the Public Land Laws, filed in the Land Office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if open to entry as herein provided." (43 USC. 315 (f)).

This section must be used in all applications filed under the Public Land Laws, including the so-called Isolated Tracts Act.

The receiving of applications under the above quoted proviso of the said Section 7 and the classification of lands thereunder, are both clearly mandatory. The Secretary may also, in his discretion, classify for disposal without any citizen making application therefor.

The language used in Section 7 requires some explanation. It states that an applicant qualified to make entry, selection or location under the Public Land Laws, who makes any such application, *shall* cause the land applied for to be classified and if the application is allowed by the Secretary, it *shall* entitle the applicant for a preference right to enter, select or locate such lands, if open entry is herein provided.

According to the Glossary of Public Land Terms, 1949, USDI, BLM, Page 3, an applicant is: "an individual, corporation, state or local government, etc., applying for rights or title to, public

lands or resources . . .". An application is "a formal request for rights in, or eventual title to, public lands or resources." An entry is "in general, an allowed application which was submitted by an applicant who will acquire title to the land by payment of cash or its equivalent and/or by entering upon and improving the land." In like way, a "selection" deals with an applicant who seeks to exchange property with the Federal government.

Therefore, as can be plainly seen, the Secretary's decision in these matters is not committed wholly to his discretion. Once the proper person has made an application, said applicant has, "a preference right to enter, select, or locate such lands if open to entry as herein provided." (43 USC. 315 (f)).

This right under Section 7 of The Taylor Grazing Act, is not to be confused with the preference right given to adjoining land owners under Section 14 of The Taylor Grazing Act. (43 USC. 1171)

Therefore, under Section 7 of The Taylor Grazing Act, there exists the right of a qualified applicant to make an entry or selection under the Public Land Laws of which Section 14 of The Taylor Grazing Act, the so-called Isolated Tracts Act is one. In addition, there exists the right that the application will be considered to the extent that the selected lands will be looked at and "classified", this right being specifically mandatory as set forth in said Section 7 of The Taylor Grazing Act.

The Secretary has discretion, acting through his authorized officer, to reject or approve the application.

If the citizen's application to enter or select a certain isolated tract is approved, it is then lawful for the Secretary to order disposal of the selected lands which is done under Section 14, by auction.

These rights exist under the statutes.

(b) *Rights Under the Regulations.*

Once the auction on the land has been held, do any rights accrue

to the applicant who is the high bidder?

It is the Secretary's position that no rights accrue. The lower court relied heavily upon 43 CFR,250.5.[10] The Ninth Circuit found in this case, that by reason of this regulation, the discretion of the Secretary as to whether or not to sell, was completely unreviewable until a cash certificate was issued.

If this regulation is read in conjunction with the other regulations, this can clearly not be the proper interpretation. It is true that 43 CFR. 250.5 says "the authorized officer may, at any time, determine that the land should not be sold" prior to the issuance of a cash certificate. The question remains: On what basis may he make such determination? A reading of this regulation in conjunction with the other regulations leads to the inescapable conclusion that there are only certain things upon which this determination can be based, otherwise the other regulations are unnecessary and of no force and effect.

A subsequent regulation, 43 CFR. 250.11, which is headed "Action at Close of Bidding" states in part as follows:

(a) Declaration of Highest Bidder.

"When all persons present shall have ceased bidding, the manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchase of owners of contiguous land (see paragraph (b) of this Section), announce the amount of the highest bid and declare the offeror thereof (or his principal) the highest bidder, provided that the latter immediately pays to the manager the amount of the bid, if he has not already done so . . ."

The Section goes on to set forth the right of adjoining land owners as to their preference right, and ends by saying as follows:

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[10]"Section 250.5. Effective Application. The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from any other application under the Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

"(4) If, by the end of the preference right period, no preference right has been asserted, the sale will be declared closed and the manager may declare the highest bidder the *purchaser.*" (Emphasis supplied).

By the Secretary's own regulations we now have a purchaser of the lands offered for sale. On what basis now may the authorized officer 'determine" that the lands should not be sold, pursuant to 43 CFR. 250.5?

It is appellant's contention and quite properly so, that the only basis for such a determination not to sell, must be for the failure of the conditions to be performed under 43 CFR. 250.12 which sets forth certain conditions to be performed by the successful bidder, including the reimbursement of publication costs and the filing of proof of such payment with the Land Office. Also, the successful bidder must file with the manager, a statement of his citizenship and, after performing these conditions subsequently, the regulation goes on to state:

"(c) When there has been full compliance with the regulations in this part, the manager *will* issue a cash certificate to the purchaser." (Emphasis supplied).

It may be that 250.5 is correct when it states that until a cash certificate, there is no contractual right against the United States, but there is clearly the right to have a cash certificate issued. And if there is a right to have a cash certificate issued, it follows that this right cannot be interfered with by the unbridled discretion of the Secretary.

It is acknowledged that the Secretary has the discretion to determine what land should be classified as suitable for disposal, and whether or not to accept an application, but it is contended that thereafter, this discretion ends and does not carry over to the ordinary mechanical procedure of selling the land.

II. REVIEW OF THE SECRETARY'S DECISION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Even if such discretion does carry over to the mechanical sale

or exchange of the property involved, after the application has been approved, is this discretion to such a nature that it cannot be reviewed under the Administrative Procedure Act?

On page 8(a) of its decision, the lower court held:

> "Since Section 10 of the Administrative Procedure Act prohibits judicial review of agency action". . . by law committed to agency discretion. . .', we are without power to review the Secretary's decision in this case."

Section 10(e) of the Administrative Procedure Act goes on to say in part:

> "Scope of Review — So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; . . . ."

As has been pointed out by one commentator, subsection (e) read together with the introductory clause produces this queer result: "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency action . . . found to . . . an abuse of discretion.[11]

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[11]Davis, Administrative Law, 1951 Edition, Page 842

The courts are exceedingly slow to rule that a statute precludes all judicial review.[12] Preclusion of judicial review of administrative action is not likely to be inferred.[13] The legislative intent to forbid judicial review must be clear and convincing and unmistakable.[14]

This amicus curiae does not deny the fact that classification of land suitable for disposition under Section 7 of The Taylor Grazing Act is so committed to the Secretary's discretion that it is not subject to being reviewed by this Court. Such classification necessarily involves nice questions that require complete discretion, however, to say that this discretion carries over to mechanical procedure after a sale is once instituted would appear to violate the purpose of the Administrative Procedure Act.

Certainly, no nice questions are involved as to whether or not the Secretary followed proper procedure in the mechanical processing of the sale. To so hold is to say that the Secretary has

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[12]*Guardian Life Insurance Company* v. *Bohlinger*, 308 NY.174, 124 NE2d, 110, reh den 308 NY.810, 125 NE2d, 867.

Air Line Dispatchers Assoc. v. *National Mediation Board*, 89 App. DC.24, 189 F2d. 685, cert. den. 342 US.849, 96 L. Ed. 641, 72 S.Ct.77.

See *Heikkila* v. *Barber*, 345 U.S. 229, 97 L. Ed. 972, 73 S.Ct. 603, reh. den. 345 U.S. 746, 97 L. Ed. 1371, 73 S.Ct. 828, quoting the House Report requiring the statute "upon its face" to give clear and convincing evidence.

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[13]*Estep* v. *United States*, 327 U.S.114, 90 L.Ed. 567, 66 S.Ct. 423.

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[14]"To preclude judicial review under this bill, a statute if not specific in withholding review, must upon its face give clear and convincing evidence of an intent to withhold it." Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946). Also, an exchange on the Senate floor at the time the Administrative Procedure Act was under debate, went as follows:

"Mr. Donnell: 'But the mere fact that statute may vest discretion in an agency is not intended by this bill to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?'

"Mr. McCarran: 'It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.'

"Mr. Donnell: 'I thank the Senator.' "

Senate Document 248, 79th Congress, 2nd Session, 212 at 311.

unlimited discretion to determine who the buyer is, and that this discretion is unreviewable.

The language used in *Willcoxson* v. *United States,* 313 Fed.2d, 884, is unfortunate. In that case, it developed after the sale that said public land was prospectively valuable for uranium, which, under one of the existing Acts of Congress, could not be bought nor sold under penalty of that Act.

CONCLUSION

The decision of the lower court has far-reaching effect upon the future economy of the State of Arizona, and all western states.

There are presently pending in the Federal Courts, approximately as many as twenty cases against the Secretary, the Director, and the various land Office manager, involving land disposal under The Taylor Grazing Act.[15] This figure includes as many as five land script cases rather than public auction sales or exchanges, however, these are included because they all involve the classification of the selected land under Section 7 of The Taylor Grazing Act in a like manner as entries for public auction sales or exchanges.[16] It should be pointed out that most of these appeals have arisen after from two to five years consumed in exhausting administrative remedies. Most of the citizen applicants are exhausted financially and do not feel that they can afford the expense of appealing to the courts after this period of time. A better index of the situation is the fact that during the fiscal year of

[15]Mr. Ernest Hohm of the United States Solicitor General's office, via long distance telephone call of April 16, 1965.

[16]The Taylor Grazing Act of June 28, 1934 (48 Stat.1269, 43 USC.314) authorized the Secretary of the Interior to classify land withdrawn or reserved by Executive Order of November 26, 1934 and February 5, 1935, all within grazing districts which are more suitable for any purpose other than the production of native grasses or forage plants, or which are proper for acquisition in satisfaction of any outstanding lieu, exchange, or scrip right, or land grant, or which would be proper to expose for public sale and to open such lands to entry, selection or location in accordance with such classification.

1963, the Director of the Bureau of Land Management had before him for consideration, a total of 160 appeals on public auction sales and 18 appeals on exchanges. This does not include 139 homestead applications and 485 desert land applications, which are also classified under Section 7 of The Taylor Grazing Act.[17]

A determination of this court that the acts of the Secretary are subject to judicial review would encourage him to provide more uniform application of his rules and to deny applications only for just cause and would help to prevent this type of litigation.

The number of appeals pending shows that the appellant's statement as to chaos in this administrative field is correct. No one, including the states which seek to have their lieu selections and exchange rights satisfied under the existing Public Land Laws can ever be certain of their rights and interests before the Department of the Interior. These rights have definitely been placed in jeopardy by the decisions below.

For these reasons, the Writ of Certiorari in this matter should be issued.

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[17]1963 Public Land Statistics, USDI, BLM, Table 54.

Respectfully submitted,

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16 Am.Jur.2d. Sec. 483, page 842 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

ROBERT V. FERRY, IRVING BAKER, and AUTRICE COPELAND FREEMAN, PETITIONERS,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR ET AL, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE ON BEHALF OF GUST, ROSENFELD & DIVELBESS and HOLMAN & LEWIS URGING THAT A WRIT OF CERTIORARI ISSUE

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the land disposal laws of the United States, specifically The Taylor Grazing Act, and to the administrative procedure of the Department of the Interior in land disposal cases. The questions presented necessarily include the following:

1. Whether an applicant to purchase land under Sections 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c. 865, 48 Stat. 1272, and Act of June 28, 1934, c. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171), has any rights prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification, of lands under the cash entry system of The

Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946 c. 324, 60 Stat. 243, which now appears as 5 U.S.C. 1009).

INTEREST OF AMICUS CURIAE

The amicus curiae represents a Perley M. Lewis and Mildred C. Lewis, his wife, in litigation presently before the District Court for the District of Arizona, in cause No. CIV, 5451, PHX entitled "Perley M. Lewis and Mildred C. Lewis, his wife, vs. Stewart L. Udall, et al". The Lewis's situation is comparable to the situations of Baker, Freeman and Ferry in the appeal here presented.

On April 25, 1956, a lawful application was made in the Phoenix, Arizona Land Office, Bureau of Land Management, for the sale at public auction of an isolated tract of public domain, pursuant to Sections 7 and 14 of The Taylor Grazing Act. Said sale was held and the high bidder was declared. Thereafter, within the 30-day period allowed by law for applications of adjoining land owners, such applications were filed and the full bid price paid by the applicants.

On January 25, 1960, the preference right applicants filed an agreemnet at the Land Office agreeing on a division of the land. All other procedures and requirements under the rules and regulations were met and by January 25, 1960 the parties had done everything required of them under the law and regulations then existing to purchase the land. The only remaining thing to be done being the ministerial act of the manager in directing the issuance of cash certificate and patent. This the manager failed to do for over five months, and on June 6, 1960, the acting manager vacated the previous decision of De-

cember 4, 1959 and vacated the sale held on November 3, 1959 and rejected all applications. The basis for this action was on the grounds of a new general policy issued by the Secretary of the Interior on February 23, 1960 and for no other reason.

An appeal was made by two of the applicants successfully to the Director, but only the Lewises appealed to the Secretary, thus, the Lewises were the only ones having a claim to the subject land which was sold.

Without going into the details of the appeals or the grounds thereof, at this point it is enough to state that the Secretary finally issued his final decision on December 20, 1963, over four years after the sale in 1959.

In essence, the decision of the Secretary was for no other reason except that he had changed his mind and changed his policies.

Appeal was then made under the Administrative Procedure Act to the District Court for the District of Arizona, on March 12, 1965. The basic questions involved are similar to the legal issues presented in this appeal.

ARGUMENT

The appellants in this case, as well as the State of Arizona, in its Brief of Amicus Curiae, have stated good reasons for granting of the Writ of Certiarori in this case, and this Amicus Curiae hereby supports their positions.

This Amicus Curiae feels that the determination of the Circuit Court in this cause emasculates the purpose and intent of The Taylor Grazing Act for the orderly disposal of surplus Federal land within the several states.

I RIGHTS OF APPLICANTS UNDER SECTIONS 7 and 14 OF THE TAYLOR GRAZING ACT.

As has been pointed out by appellants herein, and the State of Arizona, disposal of land pursuant to Section 14 of The Taylor Grazing Act, commonly known as the Isolated Tracts Act, is controlled by other provisions of The Taylor Grazing Act, specifically Section 7 thereof (43 U.S.C. 315 (f)).

Section 7 of The Taylor Grazing Act provides in part as follows:

> "... Upon the application of an applicant qualified to make entry selection or location under the *Public Land Laws* and filed in the Land Office of the proper District, the Secretary of the Interior *shall* cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, *shall* entitle the applicant to a *preference right* to *enter*, select or locate such land, if open to entry as herein provided." (Emphasis supplied)

Therefore, rights do accrue once the application of the proper person or entity is approved. This right is a "preference right to enter".[1] What is this right of entry? "Entry" as used in the Public Land Laws, covers all methods by which a *right to acquire title* to public lands may be initiated.[2]

According to the Glossary of Public Land Terms, put out by the Department of the Interior, an entry is defined as follows:

> "In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by *payment of cash* or its equivalent and/or by entering upon and improving the land."[3]

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[1]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f)

[2]Black's Law Dictionary, 4th Ed., page 627

[3]Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

Therefore, this "preference right to enter"[4] is a preference right to "acquire title to the land by payment of cash or its equivalent".[5]

Can the pursuit of this right be denied by the Secretary by arbitrary action on his behalf or without reason?

It was the position of the Secretary, and the court below, that this right could be denied. The argument was that the Isolated Tracts Act[6] did not specify the procedure to be followed in selling said tracts. This position was adopted by the court below.[7]

The adoption of this argument by the court below, completely ignored the fact that the Isolated Tracts Act is an integral part of The Taylor Grazing Act. In fact, the main purpose of Section 14, which is a later amendment to The Taylor Grazing Act, is to allow the Secretary to sell at public auction certain lands not exceeding 1,520 acres, which, in his judgment, would be proper to *expose* for sale.[8]

In reaching this conclusion, the appellees, and the

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[4]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f),

[5]Glossary of Public Land Terms, 1949, USDI, BLM, page 3,

[6]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171,

[7]Ferry v. Udall et al.

[8]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171; U.S. Code Congressional Service, 80th Congress, 1st Session, 1946, page 1510:

"There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program."

lower court, rely heavily upon one particular regulation of the Secretary.[9]

Appellees urge that this regulation allows the authorized officer, at any time before the cash certificate is issued, to determine, *for any reason he sees fit*, that the land should not be sold and that this determination is not subject to review by the courts.

Such an interpretation effectively nullifies the meaning of a "preference right to enter" given by Section 7 of The Taylor Grazing Act.[10] Further, it nullifies the meaning of other regulations under this same section.[11]

These regulations are quite specific in stating what rights accrue to a proper applicant and what the Secretary should do as a mechanical procedure of the sale to grant this. For example, 43 C.F.R. 250.11 says in part:

> "(a) Declaration of high bidder.
>
> "When all persons present shall have ceased bidding, the manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . , announce the amount of the highest bid and declare the offeror thereof . . . the *highest bidder*, provided that the buyer immediately pays to the manager the

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[9] 43 C.F.R. 250. 5
"Effect of Application. The filing of an application in conformity with the regulations of this part, will not segregate the lands applied for from any other application under The Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

[10] 43 U.S.C. 315 (f); Black's Law Dictionary, 4th Ed., page 627; Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

[11] 43 C.F.R. 250. 11; 43 C.F.R. 250. 12 (c)

amount of the bid, if he has not already done so . . . ."
"(4) If, by the end of the preference right period, no preference right has been asserted, the *sale will be declared closed* and the manager may declare the highest bidder the *purchaser*". (Emphasis supplied)

Regulation 43 C.F.R. 250.12(c) states as follows:

"When there has been full compliance with the regulations on his part, the manager *will* issue a cash certificate to the purchaser." (Emphasis supplied)

Keeping the "preference right to enter",[12] granted by statute, in mind, together with the Secretary's own regulations,[13] as quoted above, there would appear to be only one logical interpretation of 43 C.F.R. 250.5, and that interpretation is contrary to that of the lower court.

This regulation, 43 C.F.R. 250.5, allows the authorized officer, at any time prior to the issuance of a cash certificate, to "determine that the land should not be sold".

The question is, in the light of the statutes and regulations, on what basis may this determination be made?

By making such determination, the authorized officer is acting in a judicial capacity. Courts may make determinations in determining matters, but not for any reason they deem fit. Their determination must be based on some sound reasoning and must be based upon proper procedure. What the government is saying is that the authorized officer under this regulation can ignore the fact that he *will* issue a cash certificate if certain things are done, and that the sale *will* be closed and the highest bidder *will* be declared the highest purchaser after certain acts have been performed.[14]

The only logical construction of 43 C.F.R. 250.5 is that

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[12]Section 7, The Taylor Grazing Act; 43 U.S.C. 315(f).

[13]43 C.F.R. 250.11; 43 C.F.R. 250.12(c).

[14]43 C.F.R. 250.11 and 43 C.F.R. 250.12

the authorized officer may "determine" that the land will not be sold for failure of proper performance of conditions subsequent under the regulations,[15] or because of fraud or mutual mistake. To hold otherwise would be to say that the authorized officer may determine that the land should not be sold for any reason he sees fit, something which is not indicated by the regulations, and such a construction would also deny the "preference right to enter" granted under Section 7 of The Taylor Grazing Act.[16]

II. THE DETERMINATIONS OF THE SECRETARY AND HIS AUTHORIZED OFFICERS ARE REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Section 10 of The Administrative Procedure Act prohibits judicial review of agency action by a law committed to agency discretion,[17] but goes on to say in the same section as follows:

> "Scope of review — So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) *arbitrary, capricious and an abuse of discretion*, or otherwise not in accordance with law; . . . ." (Emphasis supplied)

It was the position of the appellees and the court below, and this position was adopted by the Circuit Court, that the acts of the Secretary and his authorized officers were not subject to judicial review.[18]

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[15] 43 C.F.R. 259. 12

[16] 43 U.S.C. 315 (f)

[17] 5 U.S.C. 1009

[18] *Ferry v. Udall.*

In reaching this result, the lower court decided that the Secretary's decision was so committed to his discretion that it was not reviewable.[19]

The court cited *Panama Canal Co. v. Grace Lines, Inc.*[20] which was a case where the court decided it would not review toll rates set by the *Panama Canal Co.* because toll rate adjustments were a matter left to the discretion of the company. It was determined by the court in that case that the decisional process was committed to the company's discretion because it involved ". . . matters upon which experts may disagree; they involve nice issues of judgment or choice, which require the exercise of informed discretion."[21]

The court went on to say that this rule applied to the case at hand and said: "Similarly, a decision of whether or not it would be in keeping with sound policy to sell a particular parcel of land at a certain offered price involves the exercise of informed discretion."[22]

It appears that the court is confusing the classification of what land is suitable for disposal with the procedure after a qualified application has been allowed and the applicant has a preference right to enter, which is the case at hand.

There is no doubt that whether or not land is suitable for sale involves nice issues of judgmet and choice which require the exercise of informed discretion. But it is extremely doubtful and even dangerous to say that procedure to be carried on after this determination has been made, involves nice issues. Is the Secretary or his au-

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[19]Ibid.

[20]356 U.S. 309

[21]Ibid.

[22]*Ferry v. Udall.*

thorized officer determining "nice issues" when he refuses to give a notice or hearing as to reappraisals made years after initial appraisal for the sale of the land? Is he determining "nice issues" when he unilaterally determines that he made a bad bargain by the initial sale? Is he determining "nice issues" when he arbitrarily refuses to recognize a previous order of his authorized officer made two years previously, that the sales were final and that the applicants were the purchasers of the land? Is he determining "nice issues" when he determines whether or not conditions subsequent to the sale as provided in the regulations have been performed?[23]

The courts are exceedingly slow to rule that a statute precludes all judicial review.[24] The legislative intent to forbid judicial review must be clear and convincing and unmistakable.[25]

Are we to say that under a single regulation which says that any time prior to the issuance of cash certificate, the authorized officer may "determine" that the land should not be sold,[26] gives him the right to make such a determination, arbitrarily, without good reason or cause and thus to deny the applicant's preference right to enter under statute?[27]

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[23]43 C.F.R. 250. 11; 43 C.F.R. 250. 12.

[24]*Guardian Life Insurance Co. v. Bohlinger*, 308 N.Y. 174, 124 NE.2d 110 Rehearing denied, 308 NY. 810, 125 NE2d, 876; *Airline Dispatchers Association v. National Mediation Board*, 89 App. D.C. 24, 189 F.2d 685, Certiorari denied. 342 U.S. 849, 96 L.Ed. 641, 72 Sup. Ct. 77.

[25]Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946)

"To preclude judicial review under this bill, a statute, if not specific in withholding review, must upon its face give clear and convincing evidence of intent to withhold it."

[26]43 C.F.R. 250. 5

[27]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f)

Where rights are involved, there should be no arbitrary denial of such rights. The term "entry" in the technical sense, means that act by which an individual acquires an *inceptive right* to a portion of the unappropriated soil of the country by filing his claim.[28] An "inceptive right" is an inchoative right.[29] This is to say that the applicant has a legal right not yet perfected, but a right nevertheless.

The right to enter public lands, when granted by statute, is one of the constitutional privileges of citizenship.[30]

Section 7 of The Taylor Grazing Act[31] gives the statutory right to an applicant whose application has been approved by the Land Office. This inchoate right, which is a constitutional right, should not be denied by arbitrary action of the Secretary and such action should be reviewable.

CONCLUSION

As was said by the Second Circuit in the case of Wei v. Rollins:[32]

> "The legislative process would completely bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefor fixes a point beyond which it is unreasonable and impractical to impell Congress to prescribe detailed

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[28]73 C.J.S. Public Lands, Sec. 36, page 685

[29]Webster's Third New International Dictionary, Unabridged Edition, Page 1141.

[30]42 Am. Jur., Public Lands, Sec. 20, page 799; 16 Am. Jur.2d, Sec 483, pg. 842; *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 Sup. Ct. 14; *U.S. v. Waddell*, 112 U.S. 76, 28 L.Ed. 673, 5 Sup. Ct. 35.

[31]43 U.S.C. 315 (f)

[32]1957, 246 F.2d 739.

> rules; it then becomes constitutionally sufficient if Congress clearly determines the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of the legislative declarations.*"

It is the position of this Amicus Curiae that under the disposal section of The Taylor Grazing Act, a right does exist, to-wit: the right to enter. That this is a constitutional right which cannot be interfered with without due process of law. To allow the Secretary or any administrative agency to do away with the constitutional right, without some form of review for arbitrariness or unreasonableness, is a violation of this constitutional right.

The case of Bennett v. Arizona State Board of Public Welfare, (1963), 95 Ariz. 170, 388 P2d 166, is analogous to the situation at hand. Under a constitutional provision similar to the Federal Constitution, the court held that a statute allowing certain controls over the right to engage in the business of operating a nursery was unconstitutional in that it did not provide for judicial review of the department's judicial decisions. In that case, the court stated:

> "We observe, as did the United States Supreme Court, that the multiplication of administrative agencies and the expansion of their functions to include adjudications, which have serious impact on prior rights, has been one of the most dramatic legal developments of the past one-half century. *Wong Yang Sun v. McGrath*, 339 U.S. 33, 70 Sup.Ct. 445, 94 L.Ed. 616. While a state may bestow upon an administrative officer or administrative agency the duty to protect the public health, safety and welfare by examining into the fitness of an individual to engage in an occupation, it cannot exclude such person from any occupation in a manner or for reasons that

contravene the due process clause of the Fourteenth Amendment. *Schwere v. Board of Bar Examiners*, 353 U.S. 232, 77 Sup. Ct. 752, 1 L. Ed.2d, 796.

"It is too well settled, to permit any argument to the contrary, that procedural due process requires petitioner be given an opportunity to be heard upon the matters which the Board of Welfare acted in denying the license. See *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 46 Sup. Ct. 215, 70 L. Ed. 494."

Since the right to enter on public lands as granted by statute is a constitutional right, the same protection from arbitrariness of administrative decisions should be given the person who had such a right.

The power of the Department of the Interior in these matters must be delineated. The court should rule once and for all whether or not a person entering upon public land under The Taylor Grazing Act has a right or a preference right to enter and whether or not that right is protected by the Constitution.

It should also determine whether or not the procedure followed by the Secretary in processing that right is subject to judicial review for being arbitrary or unreasonable.

The decision in this case will not only affect the private litigants involved and the clients of this Amicus Curiae, but will affect the State of Arizona and all of the western states in their acquisition of lands of public domain.

Therefore, the Writ of Certiorari should issue.

Respectfully submitted,

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AND
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By: James R. Holman